

501 B.R. 491
United States District Court,
S.D. New York.

In re FKF 3, LLC, Debtor.
[Ariston Properties, LLC](#) and
Conrad Roncati, Appellants,
v.
Gregory Messer, as Trustee
of the FKF Trust, Appellee.

No. 13 CIV. 3310 (ER).
|
Nov. 6, 2013.

Synopsis

Background: Trustee of liquidating trust established under debtor's confirmed Chapter 11 plan brought adversary proceeding against maker and guarantors, seeking to recover sums owing on promissory note. After defendants defaulted by failing to file any responsive pleading, trustee moved for entry of default judgment in his favor, and defendants sought to set default aside. [The Bankruptcy Court, Cecelia G. Morris, Chief Judge, 489 B.R. 24](#), granted trustee's motion and denied defendants' motion, and defendants appealed.

Holdings: The District Court, [Ramos, J.](#), held that:

[1] defendants who defaulted on state law breach of contract and turnover claims asserted by trustee did not impliedly consent to entry of final judgment on trustee's claims by non-Article-III court such as bankruptcy court, so that court's findings would be treated as mere recommendations, and

[2] “good cause” existed to set aside defendants' default in responding to trustee's complaint, notwithstanding that defendants were properly served and that grant of such relief would likely prejudice trustee in his ability to recover on any judgment that he obtained.

Vacated.

West Headnotes (25)

[1] Bankruptcy

🔑 [Consent to or Waiver of Objections to Jurisdiction or Venue](#)

Defendants who defaulted on state law breach of contract and turnover claims asserted by trustee did not impliedly consent to entry of final judgment on trustee's claims by non-Article-III court such as bankruptcy court by waiting until after entry of default judgment against them to raise a *Stern* objection to bankruptcy court's authority; given courts' preference for resolving disputes on the merits, along with strict nature of test for implied consent, defendants acted with sufficient promptness in raising issue in their motion for reconsideration, after their first and only appearance before bankruptcy court.

[Cases that cite this headnote](#)

[2] Bankruptcy

🔑 [Submission to district court for judgment](#)

Bankruptcy

🔑 [District court review or decision](#)

Bankruptcy

🔑 [Determination and Disposition;](#)

[Additional Findings](#)

Because defendants had not expressly or impliedly consented to entry of final judgment by bankruptcy court on state law claims asserted in trustee's complaint, bankruptcy court's entry of default judgment in favor of trustee had to be vacated, and bankruptcy court's findings in support of default judgment as to be treated as mere recommendations, that were reviewable de novo by district court. [28 U.S.C.A. § 157\(c\)\(1\)](#).

[2 Cases that cite this headnote](#)

[3] Federal Civil Procedure

🔑 [Grounds and Factors](#)

Federal Civil Procedure

🔑 [Meritorious cause of action or defense](#)

In deciding whether “good cause” exists to vacate entry of default, court considers: (1) whether default was willful; (2) whether defendant has demonstrated existence of meritorious defense to the defaulted claims; and (3) whether, and to what extent, vacating the default will prejudice the nondefaulting party. [Fed.Rules Civ.Proc.Rule 55\(c\)](#), 28 U.S.C.A.

[1 Cases that cite this headnote](#)

[4] [Federal Civil Procedure](#)

🔑 [Grounds and Factors](#)

Factors bearing on whether “good cause” exists to vacate entry of default must be applied in light of courts' preference for resolving disputes on the merits. [Fed.Rules Civ.Proc.Rule 55\(c\)](#), 28 U.S.C.A.

[1 Cases that cite this headnote](#)

[5] [Federal Civil Procedure](#)

🔑 [Setting Aside](#)

While same factors are analyzed to determine whether administrative default and default judgment should be vacated, there is a more forgiving standard for setting aside administrative default. [Fed.Rules Civ.Proc.Rule 55\(c\)](#), 28 U.S.C.A.

[2 Cases that cite this headnote](#)

[6] [Evidence](#)

🔑 [Mailing, and delivery of mail matter](#)

Courts presume that addressee received a mailed item, where sender presents proof that it was properly addressed, stamped, and deposited in the mail.

[Cases that cite this headnote](#)

[7] [Evidence](#)

🔑 [Mailing, and delivery of mail matter](#)

[Evidence](#)

🔑 [Rebuttal of presumptions of fact](#)

While presumption that properly addressed and mailed item is received is rebuttable one, it is very strong presumption, that can be rebutted only by specific facts and not by mere affidavit to the contrary.

[Cases that cite this headnote](#)

[8] [Bankruptcy](#)

🔑 [Default](#)

Speculation that copy of summons and complaint that trustee had properly addressed and placed in mail may have been taken by other tenants at business address used by defendant, or that copy of summons and complaint properly addressed and mailed to defendant's home address may have been misplaced by individuals that defendant hired to perform household duties, was insufficient to rebut presumption of receipt, so that court would treat defendant as having been properly served in ruling on his motion for relief from default entered against him. [Fed.Rules Civ.Proc.Rule 55\(c\)](#), 28 U.S.C.A.

[Cases that cite this headnote](#)

[9] [Federal Civil Procedure](#)

🔑 [By Default](#)

Default judgment is extreme sanction, that should be imposed only upon serious showing of willful default.

[Cases that cite this headnote](#)

[10] [Federal Civil Procedure](#)

🔑 [Grounds](#)

For defendant's default to be “willful,” and to warrant entry of default judgment against him, it must be deliberate, rather than merely negligent or careless.

[2 Cases that cite this headnote](#)

[11] [Federal Civil Procedure](#)

🔑 [Grounds](#)

“Willfulness” may be found, of kind sufficient to support entry of default judgment, when

defaulting party makes conscious decision to allow hearing to go forward without a response, or when conduct of defaulting party or his counsel is egregious and is not satisfactorily explained.

[Cases that cite this headnote](#)

[12] Federal Civil Procedure

🔑 [Grounds](#)

Relevant inquiry for court, in deciding whether default is “willful” and sufficient to support entry of default judgment, is defaulting party’s actions after it became aware of existence of litigation or entry of default.

[4 Cases that cite this headnote](#)

[13] Bankruptcy

🔑 [Default](#)

Defendants’ default in failing to respond to trustee’s properly served complaint was not “willful,” and this lack of willfulness was factor that district court could consider in deciding whether their default should be vacated, given that defendants immediately contacted attorney upon learning of trustee’s motion for entry of default judgment and requested extension of time to respond to trustee’s motion. [Fed.Rules Civ.Proc.Rule 55\(c\), 28 U.S.C.A.](#)

[1 Cases that cite this headnote](#)

[14] Federal Civil Procedure

🔑 [Meritorious cause of action or defense](#)

To demonstrate a “meritorious” defense, in support of motion to vacate a default or default judgment, defendant need not demonstrate a defense that will ultimately be persuasive at trial; defense is “meritorious” if it is good law, so as to give the factfinder some determination to make. [Fed.Rules Civ.Proc.Rule 55\(c\), 28 U.S.C.A.](#)

[Cases that cite this headnote](#)

[15] Federal Civil Procedure

🔑 [Meritorious cause of action or defense](#)

To demonstrate, in support of motion to vacate a default or default judgment, a defense that is “meritorious,” defaulting party must present evidence beyond conclusory denials, and this evidence, if proven at trial, must constitute a complete defense. [Fed.Rules Civ.Proc.Rule 55\(c\), 28 U.S.C.A.](#)

[Cases that cite this headnote](#)

[16] Bankruptcy

🔑 [Default](#)

Defendants who defaulted by failing to file any response to trustee’s state law breach-of-contract complaint sufficiently demonstrated existence of “meritorious” defense based on language in release that seemed to relieve them of liability on guarantees, notwithstanding trustee’s contention that, even if release were interpreted as defendants proposed, it was not supported by any reasonably equivalent value and would be avoidable as fraudulent transfer; trustee’s fraudulent transfer claim presented fact issue that could not be resolved in deciding whether default judgment was properly entered against defendants or whether they were entitled to relief from default. [11 U.S.C.A. § 548\(a\)\(1\)\(B\); Fed.Rules Civ.Proc.Rule 55\(c\), 28 U.S.C.A.](#)

[Cases that cite this headnote](#)

[17] Contracts

🔑 [Construction as a whole](#)

When faced with allegedly conflicting provisions in contract, court must be slow in reaching result which invalidates contractual provisions, but must instead strive, if possible, to interpret contract in manner which harmonizes and gives effect to all of its provisions.

[Cases that cite this headnote](#)

[18] Contracts

🔑 [Construction as a whole](#)

Interpretation of contract which gives a reasonable, lawful, and effective meaning to all its terms is preferred to one which leaves a part unreasonable, unlawful, or of no effect.

[Cases that cite this headnote](#)

[19] **Contracts**

🔑 [General and specific words and clauses](#)

If there is inconsistency within contract, it may be resolved by giving effect to the specific provision rather than to the general language.

[Cases that cite this headnote](#)

[20] **Contracts**

🔑 [Recitals](#)

While recitals in contract cannot grant rights extending beyond those particularly described in agreement, they may be useful in construing rights and obligations created by agreement.

[1 Cases that cite this headnote](#)

[21] **Bankruptcy**

🔑 [Default](#)

Setting aside defendants' default in responding to trustee's properly served complaint would prejudice trustee, and this was factor that district court could consider in deciding whether such relief was warranted or whether entry of default judgment was warranted, given that damages would continue to accrue at rate of \$821.92 per day, and that there was already a real possibility that defendants' assets were insufficient to permit recovery by trustee on any judgment that he obtained. [Fed.Rules Civ.Proc.Rule 55\(c\)](#), 28 U.S.C.A.

[Cases that cite this headnote](#)

[22] **Federal Civil Procedure**

🔑 [Grounds and Factors](#)

In deciding whether to relieve party from entry of default, court may consider relevant

equitable factors, including whether the default will produce harsh result. [Fed.Rules Civ.Proc.Rule 55\(c\)](#), 28 U.S.C.A.

[Cases that cite this headnote](#)

[23] **Federal Civil Procedure**

🔑 [By Default](#)

Default judgments are disfavored and are particularly disfavored when substantial sums of money are demanded.

[Cases that cite this headnote](#)

[24] **Federal Civil Procedure**

🔑 [By Default](#)

There is preference for resolving disputes on the merits, and doubts about whether default judgment should be entered should be resolved in favor of defaulting party.

[1 Cases that cite this headnote](#)

[25] **Bankruptcy**

🔑 [Default](#)

“Good cause” existed to set aside defendants' default in responding to trustee's complaint, notwithstanding that defendants were properly served and that grant of such relief would likely prejudice trustee in his ability to recover on any judgment that he obtained, where defendants' default was not willful and they promptly sought relief therefrom, where defendants also demonstrated a meritorious defense, and where default judgment requested by trustee was substantial, in amount of \$3 million.

[Cases that cite this headnote](#)

Attorneys and Law Firms

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OPINION AND ORDER

RAMOS, District Judge.

Ariston Properties, LLC (“Ariston”) and Conrad Roncati (“Roncati”) (collectively, “Appellants”) appeal from the Order dated March 21, 2013 granting default judgments against Appellants, entered by Chief United States Bankruptcy Judge Cecelia G. Morris (Bankr. Doc. 47).¹ For the reasons set forth below, the Order of the Bankruptcy Court is VACATED, and the case is REMANDED to Judge Morris for further proceedings consistent with this Opinion and Order.

I. Factual Background

On July 19, 2010, three creditors filed an involuntary Chapter 11 petition against FKF 3, LLC (“Debtor” or “FKF 3”) in the United States Bankruptcy Court for the Southern District of New York. Declaration *495 of Romain D. Walker, Esq. (“Walker Decl.”) (Doc. 19), Ex. B (March 13, 2013 Memorandum Decision Granting Default Judgments) (“Memorandum Decision”) at 2. The Debtor consented to the order for relief and the Bankruptcy Court entered it on August 9, 2010. *Id.* On April 18, 2011, the Bankruptcy Court confirmed the Joint Plan of Liquidation of FKF 3, pursuant to which the FKF Trust (“Trust”) was created and Gregory Messer was appointed trustee (“Trustee” or “Appellee”). *Id.*

On July 18, 2012, the Trustee commenced the underlying adversary proceeding against the Appellants, among others, by filing a complaint with the Bankruptcy Court (the “Complaint”). Bankr. Doc. 1 (“Compl.”). The Complaint alleges that on April 21, 2006, defendant GMR, LLC (“GMR”) issued an Amended and Restated Promissory Note to the Debtor in the amount of \$1,500,000 (the “Note”), evidencing a loan made by the Debtor to GMR and its principal, defendant Gary M. Ricci (“Ricci”).² Compl. ¶ 27. The loan was to be used by GMR in the development of a real property project in

Edgewater, New Jersey, in which Ricci and Roncati were partners (the “Project”).³ *Id.* ¶ 30.

Contemporaneously with the execution of the Note, both Ricci and Roncati executed Guarantees of GMR's obligation under the Note. *Id.* ¶ 33. Pursuant to the Guarantees, Ricci and Roncati “jointly and severally, absolutely, irrevocably and unconditionally guarantee[d] to [Debtor] the full, prompt and unconditional payment of the [Loan].” *Id.* ¶ 34; *see also* Declaration of Conrad J. Roncati (“Roncati Decl.”) (Doc. 18), Ex. B (Guaranty) ¶ 2. Additionally, Roncati and Ricci each pledged their membership interests in Ariston⁴ and GMR, respectively, to the Debtor as additional security for GMR's obligations under the Note. Compl. ¶ 35; *see also* Roncati Decl., Ex. C (Ariston Pledge and Security Agreement).

In or around August 2006, Ricci informed the Debtor in writing that he was transferring his interest in the Project and that Roncati would be taking over responsibility for the Loan. Compl. ¶ 36. Ricci simultaneously requested a return of his \$350,000 Cash Collateral, less the interest due on the Note through December 31, 2006 and the Debtor's legal fees in connection with the change. *Id.* On August 8, 2006, the Debtor returned \$150,000 of the Cash Collateral to Ricci, and on September 2, 2006, the Debtor returned the remaining \$76,583.34 of the Cash Collateral after \$123,416.66 in interest and fees due on the Note through December 31, 2006 were deducted. *Id.* ¶ 37. The Trustee alleges that other than the deductions to the Cash Collateral, no interest, fees or principal payments were ever made on the Note. *Id.* ¶ 38.

On November 10, 2010, the Debtor sent a demand to Roncati and GMR demanding the repayment of the Note. *Id.* ¶ 40. On December 3, 2010, Roncati responded to the Debtor's correspondence through his counsel, claiming that the Debtor released Roncati pursuant to an August 11, 2006 agreement (the “Release”). *Id.* ¶ 41. The Release provided, among other things, as follows: (i) the release of GMR from its obligations under the Note; (ii) the release *496 of Ricci and Roncati from their obligations under the Guarantees; and (iii) the assumption of GMR's obligations under the Note by Ariston. *Id.* ¶ 42. The Trustee alleged in the Complaint that the Release was never signed by the Debtor and is unenforceable for at least that reason.⁵ *Id.* ¶ 83.

The Complaint states claims against Appellants for breach of contract based upon Appellants' alleged breach of the Note and the Guarantees, *id.* ¶¶ 43–53, and for turnover of property of the estate pursuant to 11 U.S.C. § 542(b) for the amounts due under the Note. *Id.* ¶¶ 54–64. Moreover, in the event that the Bankruptcy Court finds that the Release “constitutes a valid release of GMR's, Ricci's and/or Roncati's obligations under the Note, Guarantees and related agreements,” *id.* ¶ 83, the Complaint states a claim for fraudulent conveyance as an alternative to the breach of contract and turnover of property claims. *Id.* ¶¶ 66–90. Specifically, the Trustee alleges that the Release was an avoidable transfer because, among other things, the Debtor received less than fair consideration in exchange for the release of Appellants. *Id.* ¶ 87.

II. The Underlying Adversary Proceeding

On July 23, 2012, a summons was issued by the Bankruptcy Court with respect to the Complaint. Bankr. Doc. 2. On July 24, 2012, the Trustee served the summons upon all defendants. Bankr. Doc. 3. The deadline to answer or otherwise respond to the Complaint was August 22, 2012, however, no answer or response was filed on that date. Memorandum Decision at 3. Accordingly, the Trustee filed a request for entry of default against all defendants, which the Clerk of Court entered on September 6, 2012. *Id.*

On September 5, 2012, the Trustee requested that another summons be issued. *Id.* The new summons (the “Second Summons”) was issued by the Clerk's Office, and on September 10, 2012, GMR, Ricci, Ariston and Roncati were re-served at different addresses. *Id.* at 3–4. Again, none of the defendants timely responded to the Second Summons and Complaint by the October 9, 2012 deadline. *Id.* at 4. Thereafter, the Trustee requested that a second default be entered against GMR, Ricci, Ariston and Roncati. *Id.* In response, the Clerk's office advised the Trustee that the defaults previously entered against defendants were valid and that the entry of additional defaults was unnecessary. *Id.*

On November 15, 2012, the Trustee filed a Motion for Default Judgment, which was served upon all defendants at all addresses previously utilized by the Trustee for service. *Id.* None of the defendants filed a response to the motion by the December 10, 2012 deadline. *Id.* On December 21, 2012, Ricci filed an objection, and on

December 26, 2012, Roncati filed an objection on behalf of himself and Ariston. *Id.* As the clerk entered defaults against Appellants pursuant to Fed.R.Civ.P. 55(a),⁶ the Bankruptcy Court treated Appellants' objection as a motion to vacate entry of default pursuant to Fed.R.Civ.P. 55(c), which states that “[t]he court may set aside an entry of default for good cause.” *Id.* at 4–5.

After a hearing on January 8, 2013, the Bankruptcy Court issued the Memorandum *497 Decision on March 13, 2013, Bankr. Doc. 46, and an Order Directing the Entry of Default Judgments Against Defendants on March 21, 2013 (“Default Judgment Order”), Bankr. Doc. 47. Thereafter, on April 8, 2013, the Bankruptcy Court issued an Order denying Appellants' motion for reargument, Bankr. Doc. 54, and on April 19, 2013, the Bankruptcy Court issued an Order denying Appellants' motion for a stay pending appeal pursuant to Fed. R. Bankr.P. 8005, Bankr. Doc. 61.

III. Appellants did Not Impliedly Consent to the Entry of a Final Order by the Bankruptcy Court

The Bankruptcy Amendments and Federal Judgeship Act of 1984 (the “1984 Bankruptcy Act”) divided proceedings related to a bankruptcy into “core” and “noncore,” giving final adjudicative power to the bankruptcy court in the former, but not the latter case. *See* 28 U.S.C. § 157; *see also In re Coudert Bros. LLP*, No. 11–2785(CM), 2011 WL 5593147, at *10 (S.D.N.Y. Sept. 23, 2011). Section 157 also provides, however, that a bankruptcy court may finally adjudicate a non-core matter if the parties consent to such adjudication. *In re Coudert Bros. LLP*, 2011 WL 5593147, at *10. The core/non-core division in the 1984 Bankruptcy Act was intended to move final adjudicative authority over proceedings involving “public rights” to the Article I bankruptcy courts, while retaining matters not at the “core” of the Congressionally-created right to a bankruptcy discharge (i.e., claims involving “private rights”) to the Article III courts for final determination. *Id.* at *5. Congress tried to delineate the “core” of the public right to a bankruptcy discharge by listing examples of claims that it believed the bankruptcy courts could finally adjudicate in the statute. *Id.* In *Stern v. Marshall*, — U.S. —, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), however, the Supreme Court held that “Congress did not altogether succeed in its goal: some claims, though denominated ‘core’ under the statute, nevertheless involve only private rights, which preclude the Bankruptcy Court from finally

adjudicating them.” *In re Coudert Bros. LLP*, 2011 WL 5593147, at *6. The *Stern* decision thus “demonstrates that the constitutional question is not congruent with the text of the bankruptcy statute,” and that in determining whether the bankruptcy court has authority to make final adjudications, courts must consider whether the claims to be adjudicated involve “public” or “private” rights, and not simply whether the claims were delineated by Congress as “core” in the statute. *Id.* at *7. If the claims involve “private” rights, the bankruptcy court does not have final adjudicative power over the claims. *Id.*

Here, Appellee appears to concede that the claims in the adversary Complaint involve “private” rights. Indeed, Appellee’s entire argument with respect to the adjudicative authority of the Bankruptcy Court centers on whether Appellants “impliedly consented” to entry of the default judgment by the Bankruptcy Court. *See* Appellee’s Mem. L. Opp. (Doc. 25) 19–21. Accordingly, as the parties agree that the claims at issue are not within the adjudicative authority of the Bankruptcy Court,⁷ *498 the preliminary issue before this Court is whether Appellants consented to the Bankruptcy Court’s final adjudication of the claims. If Appellants did consent, the appeal should proceed under 28 U.S.C. § 158(a)(1), which gives the Court power to hear appeals from “final” orders. *See In re Coudert Bros. LLP*, 2011 WL 5593147, at *10. If Appellants did not consent to final adjudication by the Bankruptcy Court, however, then the Default Judgment Order should be vacated, and Judge Morris’s “final” determinations in the Memorandum Decision treated as recommendations under § 157(c)(1) and reviewed *de novo* by this Court.⁸ *Id.*

[1] Appellee concedes—and a review of the record confirms—that Appellants did not expressly consent to the Bankruptcy Court’s entry of a final order on Appellee’s claims. Rather, Appellee argues that Appellants “impliedly consented to entry of a final order by a bankruptcy judge by failing to respond to the properly served summons and complaint.” Appellee’s Mem. L. Opp. Mot. to Stay (Doc. 23) 19. In support of its argument, Appellee cites to *In re Oldco M. Corp.*, 484 B.R. 598 (Bankr.S.D.N.Y.2012). In that case, the bankruptcy court held that

Where a summons and complaint have been properly served and the defendant has failed to respond ...

the defendant’s actions, or lack thereof ... constitute implied consent to the entry of a default judgment by a bankruptcy judge. The answer is the same whether the claims asserted in the adversary complaint are core, non-core, or core but for which only an Article III judge may enter a final order or judgment consistent with the U.S. Constitution absent consent.

Id. at 614.

Here, Appellants failed to respond to the Complaint. However, they filed an opposition to the Trustee’s motion for default judgment and appeared at the hearing on the motion. Moreover, although Appellants did not raise the issue of the Bankruptcy Court’s adjudicative authority in their opposition to the motion for default judgment, they did raise the argument to the Bankruptcy Court in their motion for reargument.⁹ *See* Mot. for Reargument (Bankr. Doc. 53) 14–15. The defendant in *Oldco M. Corp.*, on the other hand, did not file a response to the complaint or the Trustee’s motion for default judgment or appear at the hearing on the motion. *Oldco M. Corp.*, 484 B.R. at 600–01. Accordingly, based on the narrow facts of the case, the bankruptcy court in *Oldco M. Corp.* made clear that it was not deciding “whether or when a bankruptcy judge may order entry of a final default judgment *other than* as a result of a defendant’s failure to respond to the adversary complaint.” *Id.* at 601 n. 3 (emphasis added). *499 Indeed, in deciding the issue, the bankruptcy court reviewed recent post-*Stern* decisions of district courts within this Circuit which recognize that implied consent continues to be a “proper basis for upholding the exercise of authority of a bankruptcy judge to enter a final order or judgment,” but that “implied consent *should not be easily found.*” *Id.* at 606, 609 (emphasis added). Accordingly, as Appellants appeared in the adversary proceeding and ultimately raised the issue of the Bankruptcy Court’s authority to issue the default judgments during the course of that proceeding, the Court finds that the *Oldco M. Corp.* decision is distinguishable from the facts at issue here.

Prior to *Stern*, courts in this Circuit “routinely found that parties could and did consent implicitly to the exercise of final jurisdiction by the Bankruptcy Court even with

respect to non-core matters.” See *In re Coudert Bros. LLP*, 2011 WL 5593147, at *10 (citing cases). Although the Supreme Court in *Stern* confirmed that consent can be a sufficient basis for final adjudication by a bankruptcy court, *id.* (citing *Stern*, 131 S.Ct. at 2608), this Court has held that “[f]ollowing *Stern*, it is doubtful whether mere participation in litigation is enough to imply consent.” *Id.* at *12. Accordingly, in light of the directive from the Second Circuit that “a court should not lightly infer from a litigant’s conduct consent to have private state-created rights adjudicated by a non-Article III bankruptcy judge,” *In re Men’s Sportswear, Inc.*, 834 F.2d 1134, 1138 (2d Cir.1987), the court in *In re Lyondell Chem. Co.*, 467 B.R. 712 (S.D.N.Y.2012), a post-*Stern* decision, held that the defendants did not impliedly consent to final adjudication by the bankruptcy court by participating in proceedings before the bankruptcy court without objection for over a year. *Id.* at 722. Similarly, in *In re Madison Bentley Assocs., LLC*, 474 B.R. 430 (S.D.N.Y.2012), the court noted that “[t]he test for consent is strict” and, accordingly, held that defendants did not consent to final adjudication by the bankruptcy court by litigating the adversary proceeding for over a year and a half. *Id.* at 436–37, 439–40 (noting that “a waiver of important rights should only be found where it is fully knowing”) (internal quotations marks and citation omitted); see also *In re Arbco Capital Mgmt., LLP*, 479 B.R. 254, 266–67 (S.D.N.Y.2012) (holding that defendant did not consent to the bankruptcy court’s jurisdiction to enter a final order where defendant “participated in two ‘hearings’ before the Bankruptcy Court without raising any objection to its jurisdiction”).

[2] In determining implied consent, courts typically consider whether the objection to the bankruptcy court’s authority is raised before or after any trial activities have occurred or a judgment has been entered, with the latter weighing in favor of a finding of implied consent. See, e.g. *In re Lyondell Chem. Co.*, 467 B.R. at 722; *In re Madison Bentley Assocs., LLC*, 474 B.R. at 439. Although in this case, Appellants first raised the issue of the Bankruptcy Court’s adjudicative authority after the default judgments had been entered against them, the Court nevertheless finds that Appellants did not impliedly consent to the Bankruptcy Court’s final adjudication of the Trustee’s claims. Most litigants who have been found by courts within this Circuit to have impliedly consented to final adjudication by the bankruptcy judge failed to object during any of the “extensive proceedings”

before the bankruptcy court or in their appeal of the bankruptcy court’s final order or judgment to the district court. See, e.g., *In re Men’s Sportswear, Inc.*, 834 F.2d at 1137–38 (holding that defendant impliedly consented to the bankruptcy court’s final adjudication *500 of the matter where defendant failed to object to the bankruptcy judge’s assumption of “core jurisdiction” at any point during the “extensive proceedings before the bankruptcy court” and also “fail[ed] to object to any part of the appeal process in the district court”); *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 462 B.R. 457, 472 (S.D.N.Y.2011) (“Where a party participates in *extensive litigation* without raising an argument of which it was aware, it would be unfair and inefficient to allow that party to escape the consequences of its knowing silence.”) (emphasis added); *In re Tyson*, 433 B.R. 68, 76–77 (S.D.N.Y.2010) (holding that defendants impliedly consented to bankruptcy court’s final adjudication of claims where defendants did not object before or during trial or during post-trial motion practice in the bankruptcy court). Here, Appellants did not participate in “extensive proceedings” before raising the issue of the Bankruptcy Court’s authority to issue a final judgment. Rather, Appellants raised the issue in their motion for reconsideration after their first and only appearance before the Bankruptcy Court, as well as before this Court on their appeal. In light of the “strict” test for a finding of consent, the Court finds that Appellants did not impliedly consent to the Bankruptcy Court’s entry of the default judgments at issue. Accordingly, the Default Judgment Order is vacated, and Judge Morris’s findings in the Memorandum Decision are treated as recommendations under § 157(c)(1) and reviewed *de novo* by this Court.

IV. Applicable Law

[3] [4] [5] In determining whether there is “good cause” to vacate an entry of default under Fed.R.Civ.P. 55(c), courts in this Circuit apply a three-factor test: (1) whether the default was willful; (2) whether the defendant demonstrates the existence of a meritorious defense to the defaulted claims; and (3) whether, and to what extent, vacating the default will cause the nondefaulting party prejudice. *W.B. David & Co., Inc. v. De Beers Centenary AG*, 507 Fed.Appx. 67, 69 (2d Cir.2013) (citation omitted). These criteria must be applied in light of the Second Circuit’s “oft-stated preference for resolving disputes on the merits.” *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 95 (2d Cir.1993); accord *Meehan v. Snow*, 652 F.2d 274,

277 (2d Cir.1981) (per curiam) (“[T]he extreme sanction of a default judgment [is] a weapon of last, rather than first, resort.”) (citations omitted). Moreover, although the same factors are analyzed to determine whether an administrative default and a default judgment should be vacated, there is a “more forgiving standard for setting aside an administrative default,” like the one at issue here.¹⁰ *State Farm Mut. Auto. Ins. Co. v. Cohan*, 409 Fed.Appx. 453, 456 (2d Cir.2011).

*501 a. Willfulness of the Default

1. Appellants Were Properly Served

[6] [7] When service of process is mailed pursuant to Bankruptcy Rule 7004(b),¹¹ “[c]ourts uniformly presume that an addressee receives a properly mailed item when the sender presents proof that it properly addressed, stamped, and deposited the item in the mail.” *In re Dana Corp.*, No. 06–10354(BRL), 2007 WL 1577763, at *4 (Bankr.S.D.N.Y. May 30, 2007). Although the presumption is a rebuttable one, it is “very strong” and can only be rebutted by “specific facts” and “not by a mere affidavit to the contrary.” *Id.*; accord *In re Ms. Interpret*, 222 B.R. 409, 413 (Bankr.S.D.N.Y.1998) (“[A] party must do more than merely assert that it did not receive the mailing; its testimony or affidavit of non-receipt is insufficient, standing alone, to rebut the presumption.”).

[8] Here, the Second Summons was mailed to Roncati's business and home address. Memorandum Decision at 10. Although Roncati admits that the addresses used were correct, with respect to the business address, he argued to the Bankruptcy Court that “the property houses several other businesses and it is not uncommon for an article of mail to be accidentally delivered to or picked up by another tenant in the building.” *Id.* With respect to the home address, Roncati asserted that “[i]f these pleadings were indeed sent to this address, assuming they arrived, the documents may have been misplaced by the person whom I have hired to perform household duties, which includes collecting the mail.” *Id.* The Bankruptcy Court found that in light of Roncati's failure to set forth “specific, objective facts to substantiate his allegations that another tenant received his mail and never returned it, or that his household staff improperly handled his mail,” he failed to rebut the “very strong” presumption that proper service was effectuated. *Id.*

Appellants do not appear to contest Judge Morris's determination that proper service was effectuated or otherwise attempt to rebut the presumption of receipt. Rather, Appellants' submissions on appeal focus on the willfulness of their default, rather than on the propriety of service. Accordingly, in light of Appellants' failure to specifically contest the Bankruptcy Court's finding of proper service, as well as Appellants' reliance on rank speculation and “a mere affidavit to the contrary,” the Court finds that Appellants have failed to rebut the “very strong” presumption of proper service.

2. Appellants' Default was Not Willful

[9] [10] [11] As Appellants were properly served with the Second Summons, the question for the Court becomes whether Appellants' default was willful. As a default judgment is an “extreme sanction,” *Meehan*, 652 F.2d at 277, it should only be imposed upon a “‘serious showing of willful default.’” *Tripmasters, Inc. v. Hyatt Int'l Corp.*, No. 82 Civ. 6792(JFK), 1984 WL 1057, at *2 (S.D.N.Y. Oct. 23, 1984) (quoting *Davis v. Musler*, 713 F.2d 907, 916 (2d Cir.1983)). Accordingly, the Second Circuit has interpreted the “willfulness” factor to refer to conduct that is deliberate, rather than merely negligent or careless. *S.E.C. v. McNulty*, 137 F.3d 732, 738 (2d Cir.1998) (citations omitted). On the other hand, willfulness may be found where the defaulting party “‘made a conscious decision to allow a hearing to go *502 forward without a response,’” *In re FairPoint Commc'ns*, 462 B.R. 75, 80 (Bankr.S.D.N.Y.2012) (citation omitted), or where the conduct of counsel or the litigant was egregious and was not satisfactorily explained. *McNulty*, 137 F.3d at 738.

[12] Courts in this District have noted that the relevant inquiry for determining willfulness is the defaulting party's actions after it became aware of the existence of the litigation or entry of default. *See, e.g. In re FairPoint Commc'ns, Inc.*, 462 B.R. at 81; *In re JWP Info. Servs., Inc.*, 231 B.R. 209, 212 (Bankr.S.D.N.Y.1999) (“It is [the party's] actions after he became aware of the existence of the Trustee's motion ... that reaches the level of willfulness.”). Thus, even where notice was adequate and the defaulting party failed to rebut the presumption of receipt, if the party responded promptly after learning of the action, courts have found that the party's default was not willful. *See, e.g. In re FairPoint Commc'ns, Inc.*, 462 B.R. at 81 (holding that defendant's default was not willful

where he filed a motion for reconsideration eleven days after discovering that an order had been issued against him); *In re Journal Register Co.*, No. 09–10769(ALG), 2010 WL 5376278, at *1, *3 (Bankr.S.D.N.Y. Dec. 23, 2010) (finding that even where claimant's delay in responding was due to her attorney tardily discovering a “previously unreviewed Claim Objection” that was in his possession, the claimant did not act willfully “because she did not have actual knowledge [of the] proceeding and promptly sought relief”); *Tripmasters, Inc.*, 1984 WL 1057, at *3 (noting that the defaulting party “moved promptly to vacate the default judgment once it discovered that the judgment had been entered”); see also *Swarna v. Al–Awadi*, 622 F.3d 123, 142–43 (2d Cir.2010) (finding that default was not willful where defendants retained counsel one day after receiving the motion for default judgment and where counsel moved for an extension of time to respond one week later).

[13] Here, the Bankruptcy Court based its finding of willful default on the fact that although Roncati admitted becoming aware of the action in November 2012, Appellants nevertheless failed to promptly file a motion to vacate the default “or otherwise attempt[] to rectify their defaults once they became aware of the action.” Memorandum Decision at 11–12. Moreover, the Bankruptcy Court noted that despite being properly served with the motion for default judgment, Appellants failed to file a timely response to the motion by the December 10, 2012 deadline. *Id.* at 12. Rather, Appellants did not respond to the motion or otherwise appear in the case until December 26, 2012, after the objection deadline and the presentment date for the default judgment motion had run. *Id.*

In their papers on appeal, Appellants argue that the Bankruptcy Court erred in finding that their default was willful “[g]iven Appellants' prompt action in response to the Trustee's motion for default judgment.” Appellants' Mem. L. (Doc. 22) 10. Roncati asserts that upon becoming aware of the adversary proceeding “sometime in November 2012,” he “immediately contacted [his] attorneys” who contacted the Trustee to seek an extension of time to file a response. Certification of Conrad J. Roncati (“Roncati Cert.”) (Bankr. Doc. 26–1) ¶ 8; see also Appellants' Mem. L. (Doc. 22) 11. Indeed, Appellee admits that on November 28, 2012, Charles Shaw, Esq. contacted counsel for the Trustee seeking an extension of time for Appellants to respond to the motion for

default judgment, and that “[t]he Trustee agreed to a reasonable *503 extension.”¹² Affidavit of Maeghan J. McLoughlin (“McLoughlin Aff.”) (Bankr. Doc. 35–1) ¶ 30. Moreover, Appellants appeared at the January 8, 2013 hearing on the Trustee's motion for default judgment and therefore did not “allow a hearing to go forward without a response.” *In re FairPoint Commc'ns*, 462 B.R. at 80.

The Court finds that Appellants' actions, while negligent, do not rise to the level of willfulness. Upon learning of the adversary proceeding sometime in November, Appellants should have acted more expeditiously, perhaps appearing in the Bankruptcy Court sooner than December 26—a month after learning of the matter—in light of the fact that defaults had been entered against them and the Trustee's motion for default judgment was pending. That Appellants' actions were negligent, however, does not suggest that they were sufficiently willful to justify the entry of default judgment in excess of \$3 million against them. Indeed, Roncati contends that he “immediately” contacted counsel upon learning of the proceeding and that counsel thereafter requested an extension of time to respond to the motion for default judgment, which the Trustee granted. Moreover, there is nothing to indicate that Appellants' response some 16 days after the deadline was “unreasonable” in light of the admitted consent of Appellee for an extension. Additionally, Appellants appeared at the hearing on the Trustee's motion for default judgment and were heard on the matter. Thus, although Appellants would have been advised to notify the Bankruptcy Court of its intention to appear in the matter immediately upon learning of the proceeding, the Court finds that Appellants' actions were not willful.¹³

b. Meritorious Defense

[14] [15] The Second Circuit has held that “[t]o satisfy the criterion of a ‘meritorious defense,’ the defense need not be ultimately persuasive at this stage. ‘A defense is meritorious if it is good law so as to give the fact finder some determination to make.’” *In re JWP Info. Servs., Inc.*, 231 B.R. at 213 (quoting *Am. Alliance Ins. Co., Ltd. v. Eagle Ins. Co.*, 92 F.3d 57, 61 (2d Cir.1996)). However, the defaulting party must present evidence beyond conclusory denials, and such evidence, if proven at trial, would constitute a complete defense. *Id.* (citations omitted).

[16] Appellants argue that the Bankruptcy Court erred in finding that the Release does not provide a

meritorious defense to the Trustee's claims. Specifically, the Bankruptcy Court found that Paragraph 9 of the Release, which “applies specifically to Roncati ... counters any assertion that he is free of liability.” Memorandum Decision at 16. Paragraph 9 states:

***504 Ratification and Reaffirmation.** Roncati hereby ratifies and reaffirms his absolute and unconditional obligations under the Loan, the Security Instrument and the other documents executed by Roncati in connection with the Loan, and represents and warrants to FKF that the Security Instrument and other loan documents are in full force....

Id. at 16–17. Moreover, the Bankruptcy Court found that “further evidence of Roncati's obligation to repay the loan is found in Paragraph 6,” which states in part that “Roncati agrees that his obligations under the Note shall in no way be affected by the release by lender of Ricci from his obligations under the Loan....” *Id.* at 17. Indeed, the Bankruptcy Court found that “there has been no evidence presented which indicates that Roncati was released of his obligations under the loan or security agreement,” *id.*, despite the fact that Paragraph 5 includes language specifically releasing Roncati “from [his] obligations under the Guaranty.” Roncati Decl. (Doc. 18), Ex. D (Release) ¶ 5.

Roncatti argues that he was neither a party nor a signatory to the Note and would therefore have no individual liability under the terms of the Note but for the Guaranty, which he was expressly released from under the terms of the Release. Appellants' Mem. L. (Doc. 22) 4. Specifically, Paragraph 5 provides:

Release of Transferor Ricci and Roncati: ... In reliance on Ricci's representations and warranties in this Agreement, Lender releases Ricci and Roncati from their obligations under the Guaranty....

Roncatti Decl. (Doc. 18), Ex. D (Release) ¶ 5.

With respect to the language in Paragraph 9 whereby Roncati ratified and reaffirmed his obligations under the “Loan,” Roncati argues that the “Loan” is not a single document which can be interpreted to confer benefits or liability on any party, but is rather a series of related transactions governed by four primary documents, *viz.*, the Note, the Guaranty, the Security Instrument, and the Release. *Id.* at 7–8. Accordingly, it is erroneous to

read language referencing the *Loan* as sufficient to impose liability on Roncati under the *Note*.¹⁴ *Id.* Moreover, Roncati argues that the Security Agreement does not impose individual liability on him for the Loan; rather, it grants Debtor the right to an interest in Ariston as collateral security in the event of default on the Loan. *Id.* at 5. However, to the extent that the Release is read to contain inconsistent language, Roncati argues that under New Jersey law, to which the parties to the Release agreed to be bound, *see* Roncati Decl. (Doc. 18), Ex. D (Release) ¶ 17(a), the intent of the parties should be considered in determining the rights and obligations of the respective parties. Appellants' Mem. L. (Doc. 22) 8. In that regard, Appellants have submitted a prior draft of the Release in which additional references to Roncati's obligations under the Guaranty were stricken, thereby “evidencing the parties' clear intent to release Roncati from any obligation under the Guaranty.” Appellant's Mem. L. Mot. for Stay (Doc. 17) 6; *see also* Roncati Decl. (Doc 18), Ex. E.

***505** Appellee makes two arguments in response. On the one hand, he argues that the Release should be set aside, as an “examination of the Release reveals a number of issues about its validity and application.” Appellee's Mem. L. Opp. (Doc. 25) 8. In support of that argument, Appellee notes the inconsistency between Paragraph 5 of the agreement, which “purports to include Roncati in the release,” and Paragraph 6, which contains a clear preservation of claims against Roncati under the Note. *Id.* Appellee argues that the Release was “apparently negotiated in the context that Ricci and GMR were leaving the Project, and Roncati and Ariston were taking over and assuming liability.” *Id.* According to Appellee, it would therefore make “theoretical sense” for Ricci and GMR to receive a release, but it would be “completely illogical” for Roncati or Ariston to be released from their obligations, “as they assumed control of the Project.” *Id.*

Appellee also argues, on the other hand, that the Court should uphold the “unambiguous” language of the Release stating that “Roncati is obligated to pay for the existing liabilities.” *Id.* at 13–14. Appellee appears to ignore the language of the agreement releasing Roncati from liability under the Guaranty, and instead focuses on the “unambiguous” language of Paragraph 9 obligating Roncati under “the Loan, the Security Instrument and any other documents executed by Roncati in connection with the Loan.” *Id.*

Finally, Appellee argues that “to the extent that there is an arguably meritorious defense that requires the submission of evidence, it is irrelevant because of Roncati’s failure to submit any defense that the Release is not avoidable as a fraudulent conveyance.” *Id.* at 14.

[17] [18] In light of its review of the Release, as well as the other Loan documents, the Court finds that Appellants have put forth a meritorious defense. Although the Court need not provide its interpretation of the Release as a matter of law at this stage, in light of the language in the Release expressly releasing Roncati from his obligations under the Guaranty, it is satisfied that Appellants have met their burden of demonstrating a meritorious defense based on “good law so as to give the fact finder some determination to make.” *In re JWP Info. Servs., Inc.*, 231 B.R. at 213. Indeed, Appellee himself has admitted that the agreement “purports to include Roncati in the release.” Appellee’s Mem. L. Opp. (Doc. 25) 8. Appellee essentially asks this Court to ignore the contractual language releasing Roncati from liability under the Guaranty because, according to Appellee, it would be “completely illogical” for FKF 3 to release Roncati from liability. However, it is a fundamental canon of contract interpretation that when faced with “allegedly conflicting provisions in contracts,” courts are “cautioned to be slow in reaching a result which invalidates contractual provisions, but to instead strive where possible to interpret contracts in a manner which harmonizes and gives effect to all of their provisions.” *In re Kara Homes, Inc.*, No. 06–19626(MBK), 2009 WL 4250035, at *4 (Bankr.D.N.J. Nov. 20, 2009) (citation omitted). “An interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.” *Id.* (citing *Capitol Bus Co. v. Blue Bird Coach Lines, Inc.*, 478 F.2d 556, 560 (3d Cir.1973) (“A contract is to be considered as a whole, and, if possible, all its provisions should be given effect....”)).

[19] The interpretation offered by the Appellee renders the provisions of the agreement releasing Roncati from his obligations *506 under the Guaranty ineffective. Where there is inconsistency within a contract, it may be resolved “by giving effect to the specific provision rather than to the general language.” *Bechtel Corp. v. Local 215, Laborers’ Int’l Union of N. Am.*, AFL–CIO, 544 F.2d 1207, 1212 (3d Cir.1976); accord *Aramony v. United Way of Am.*, 254 F.3d 403, 413–14 (2d Cir.2001) (“[S]pecific words will

limit the meaning of general words if it appears from the whole agreement that the parties’ purpose was directed solely toward the matter to which the specific words or clause relate.”) (quoting 11 Richard A. Lord, *Williston on Contracts* § 32:10, at 449 (4th ed. 1999)). Accordingly, although the Court declines to decide the issue at this stage, it notes that the apparent inconsistency between the terms of the Release, as acknowledged by both parties, may be resolved by comparing the inconsistent provisions and considering them in the context of the entire agreement to determine which of the inconsistent provisions contains more specific language or wording, or whether the provisions may in some sense be harmonized.

[20] Finally, although recitals in a contract cannot grant rights extending beyond those particularly described in the agreement, they may be useful in construing the rights and obligations created by the agreement. *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103–04 (2d Cir.1985) (citing *Genovese Drug Stores, Inc. v. Ct. Packing Co., Inc.*, 732 F.2d 286, 291 (2d Cir.1984) (“[A]n expression of intent in a ‘whereas’ clause of an agreement ... may be useful as an aid in construing the rights and obligations created by the agreement, but it cannot create any right beyond those arising from the operative terms of the document.”)). Here, the recitals state that “Lender has been asked to consent to ... the release of Roncati from his obligations under the Guaranty,” Recital D, and that “Lender has agreed to consent ... to release Ricci and Roncati from their obligations under the Guaranty,” Recital E. Despite the clear wording of the recitals, neither the parties nor the Bankruptcy Court analyzed the effect of the recitals on the rights and obligations of the parties in light of the inconsistencies in the contract as a whole.

The Court’s finding that Appellants have offered a meritorious defense is bolstered by its review of the transcript of the January 8, 2013 hearing before the Bankruptcy Court.¹⁵ At that hearing, both parties’ arguments centered, not on the Trustee’s breach of contract claim, but rather, on the Trustee’s fraudulent conveyance claim. The Trustee reiterated his argument that the Release should be deemed ineffective because there are “a number of issues” with it, Tr. at 28, but that even if the Release “actually has some meaning and is a real document,” Appellants still do not have a meritorious defense because the Release is a fraudulent conveyance, as FKF 3 received no consideration in exchange for its release of Roncati. Tr. at 30. In response, Appellants

argued that the issue of what consideration was given to FKF 3 for Roncati's release is a "factual question" that must be decided by the ultimate finder of fact and cannot be determined by the face of the document. Tr. at 39. Appellants then suggested that a possible explanation for Roncati's release is that "FKF requested that Roncati take over Mr. Ricci's duties and the management of the project," and that "FKF may have felt that it was worth the release of Mr. Roncati to have him as an architect to take over the project." Tr. at 39.

*507 The Court finds that Appellants have offered a meritorious defense with respect to the fraudulent conveyance claim. Appellants' defense need not be "ultimately persuasive at this stage," and the issue of what consideration, if any, FKF 3 received in exchange for the release of Roncati's obligations under the Guaranty is a factual question on which Appellants should be permitted to offer testimony.¹⁶ Moreover, to the extent that the Trustee suggests that the Release is somehow invalid or fraudulent, that determination cannot be made by the Court at this stage of the litigation.

c. Prejudice to Appellees

[21] With respect to the prejudice prong of the "good cause" test, Appellants argued below that the Trustee had only suffered a short delay as a result of their default and that the Trustee would suffer no prejudice if the defaults were vacated. Appellants' Opp. to Mot. for Default (Bankr. Doc. 26) 6. Appellee argued, on the other hand, that although delay alone is not sufficient to establish prejudice, a showing that the delay may "thwart plaintiff's recovery or remedy" is sufficient. Appellee's Reply Mem. L. Mot. for Default (Bankr. Doc. 35) 18 (citing *New York v. Green*, 420 F.3d 99, 110 (2d Cir.2005)). The Bankruptcy Court found that in light of the Trustee's allegation that Appellants owe \$1.5 million, plus interest, accruing at 20% per annum, "the delay due to the Defendants' failure to respond increases the risk that [the Trustee] will not be able to recover," and that this "increased risk of recovery is sufficient prejudice to the Trustee." Memorandum Decision at 14. In Appellants' submissions to this Court in support of their motion to stay, Roncati emphasizes his inability to satisfy the default judgment in light of his current financial situation. See Roncati Decl. (Doc. 18) ¶¶ 8–25. In short, the Trustee alleged below that he is entitled to recover more every day from Appellants, who may be unable to satisfy the full damages already sought.

Accordingly, the Court finds that delay, by increasing the recovery by an alleged \$821.92 a day, increases the risk of its being thwarted.¹⁷ See *Saleh v. Francesco*, No. 11 Civ. 438(PKC), 2011 WL 5513375, at *5 (S.D.N.Y. Nov. 10, 2011); see also Appellee's Reply Mem. L. Mot. for Default (Bankr. Doc. 35) 18.

V. Balancing of Factors

[22] [23] In addition to the three factors that must be weighed on a Rule 55(c) motion, a court considering whether to relieve a party from an entry of default may also consider "[o]ther relevant equitable factors," including whether the default would produce a harsh result. *Enron Oil Corp.*, 10 F.3d at 96. The default judgments entered against Appellants are for a total of over \$3 million. The Court is mindful that default judgments are disfavored and are "particularly disfavored ... when substantial sums of money are demanded." *Id.* at 97 (citations omitted). *508 Accordingly, the size of the default judgments here weigh in favor of vacatur.

[24] [25] Although the delay caused by vacating the default judgments against Appellants prejudices Appellee, the Court is mindful that in light of the "oft-stated preference for resolving disputes on the merits," *Enron Oil Corp.*, 10 F.3d at 95, doubts "should be resolved in favor of the defaulting party." *Id.* at 96 (internal quotation marks and citation omitted). Accordingly, weighing the relevant factors and equitable considerations, the Court finds that the weight of the factors tips in favor of vacatur, particularly in light of a delay of only 16 days, which arguably were within the period of the "reasonable extension" that Appellee agreed to extend to Appellants.

VI. Conclusion

For the reasons set forth above, the Bankruptcy Court's Default Judgment Order is vacated. Bankr. Doc. 47. Additionally, the administrative defaults and the default judgments entered against Roncati and Ariston are also vacated. Bankr. Docs. 10, 15, 48, 49. The matter is remanded to the Bankruptcy Court for further proceedings consistent with this Opinion and Order. The Clerk of the Court is respectfully directed to docket this decision and close the case.

Moreover, as the Court's opinion renders Appellant's Motion to Stay moot, the Clerk of the Court is respectfully directed to terminate the motion. Doc. 16.

It is SO ORDERED.

Exhibit A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: FKF 3, LLC, and 89 BROADWAY PARK
RIDGE, LLC, Debtors.

10-37170 (CGM)

355 Main Street
Poughkeepsie, New York

January 8, 2013

GREGORY MESSER, *as Trustee of the FKF Trust*,
Plaintiff,

–against–

JOHN F. MAGEE, *et al.*, Defendants.

Adv. Pro. 11-09074

GREGORY MESSER, *as Trustee of the FKF Trust*,
Plaintiff,

–against–

99 ROLAND STREET, PARK RIDGE, LLC, *et al.*,
Defendants.

Adv. Pro. 12-09063

NCP REALTY, LLC, *et al.*, Plaintiffs,

–against–

KLEIN, *et al.*, Defendants.

Adv. Pro. 12-09104

MESSER, *as Trustee of the FKF Trust*, Plaintiff,

–against–

MULLIGAN, Defendant.

Adv. Pro. 12-09076

MESSER, *as Trustee of the FKF Trust*, Plaintiff,

–against–

HIRSCH, Defendant.

Adv. Pro. 12-09081

MESSER, *as Trustee of the FKF Trust*, Plaintiff,

–against–

ORITANI SAVINGS BANK, Defendant.

Adv. Pro. 12-09077

MESSER, *as Trustee of the FKF Trust*, Plaintiff,

*509 –against–

CALLAGHAN, Defendant.

Adv. Pro. 12-09067

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE CECELIA G. MORRIS
UNITED STATES CHIEF BANKRUPTCY JUDGE

APPEARANCES:

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Park Ridge LLC, Adversary Proceeding Number 11-
09074, Messer v. Magee, and that's all.

State your name and affiliation.

MR. STEVENS: Fred Stevens, Klestadt & Winters,
counsel to Gregory Messer as Trustee of the FKF Trust.

THE COURT: I do understand—now no one wants the
front seat. So you can have the front seat. I do understand
that everybody is opposing you. So state your name and
affiliation.

MR. WALKER: I think that's right.

THE COURT: Go ahead.

MR. WALKER: Romain Walker, Law Office of Charles
Shaw on behalf of [inaudible] and Ariston Properties.

MR. HASPEL: Joseph Haspel on behalf of Burton
Dorfman.

MR. J. BURKE: John Burke on behalf of Aventine Edgewater, et al., five various defendants.

MR. P. BURKE: Patrick Burke, Your Honor, on behalf of the Magee children.

MR. CONDON: Brian—I'm sorry.

THE COURT: Go ahead. We can go back.

MR. CONDON: Brian Condon for defendant Mayer Hirsch. Good afternoon, Your Honor. David Catuogno for defendant Oritani Bank.

MS. ABOULAFIA: Elizabeth Aboulafia for defendant Provident Bank.

THE COURT: We got you another client somewhere. Mr. Startman [sic], go ahead.

MR. DuVALL: Richard DuVall from McCabe & Mack—

THE COURT: I mean DuVall.

MR. DuVALL: —for a series fraudulent conveyance defendants, D Bend Security Systems, Dick's Concrete, JM Excavating Security, Paul Nebrasky Plumbing, Pine Brush Equipment, Steel Belt Construction, Straw Ridge Rock & Tape and Sullivan Fire Protection.

THE COURT: Congratulations.

MR. DuVALL: [Inaudible-laughter] numbers on my side.

THE COURT: Mr. Wrobel.

MR. WROBEL: Good afternoon, Your Honor. Lewis Wrobel for fraudulent transfer defendants, Christiana Glass.

MR. MATSLER: Good afternoon, Your Honor. Mike Matsler, Rider, Weiner & Frankel for defendant Argenio Bros.

THE COURT: Yes, ma'am.

MS. McLOUGHLIN: Good morning, Your Honor. Maeghan McLoughlin for the Trustee.

THE COURT: I would like to tell you that it's morning but it isn't. We're already in afternoon.

MS. McLOUGHLIN: Sorry.

THE COURT: What do we got? Everybody can be seated. Mr. Stevens, what do we got?

MR. STEVENS: Your Honor—

THE COURT: And we have an adversary for—we have some adversary proceedings.

MR. STEVENS: We do, Your Honor. The agenda starts out with a matter that was actually adjourned to January 29th. That is the NCP Realty matter which we'll *511 be going forward at noon on that day. I thought the best place to start—

THE COURT: Page 3?

MR. STEVENS: Page 3 and if it's okay with Your Honor —

THE COURT: That's my Page 2 I believe. Okay.

MR. STEVENS: I think you're working with an old agenda.

THE COURT: Then I don't have a new one.

MR. STEVENS: Let me give you a new one. Ms. Gregger [Ph.] has actually asked us to amend it to include the NCP page. I have copies for everybody here.

THE COURT: Okay.

MR. STEVENS: May I approach?

THE COURT: Certainly.

[Pause in proceedings.]

MR. STEVENS: I thought if we started with the pretrial conferences if it was okay with the Court some of the parties here could be excused.

THE COURT: Okay. Sounds good.

MR. STEVENS: It may be a little bit easier. What I started with were the pretrial conferences in the 23 adversary proceedings that were commenced by the Trustee in July 23rd which I believe is what a majority of the attorneys present here are here on. In flipping to Exhibit A, Page A1 that follows the agenda where I've categorized those 23 actions and I think I can sum up exactly where they are very, very quickly.

The first category are the two cases that are already settled and resolved and will be—American Express has already had a notice of dismissal filed following an approved settlement and the Otis Elevator case is just awaiting payment but will be dismissed and removed from Your Honor's docket very, very quickly.

THE COURT: Okay.

MR. STEVENS: The next are the four adversary proceedings where there have been defaults and default judgments have already been entered by the Court and those matters are—have also been resolved.

The third category which contains 11 separate adversary proceedings is what I classified as the Jerry Self Storage cases. Those were—Jerry Self Storage was a real estate development project of the debtor's and as the allegation goes the debtor's principals had over funded a loan to Jerry Self Storage in connection with a number of other questionable transactions which are the subject of our primary adversary proceeding against Mr. Magee, et al. Also, the debtor directly funded payments to various recipients.

THE COURT: Do we have representation of every one of these? I can look down and skim it and see that we have on most. Is someone here for every one of these?

MR. STEVENS: Yes, Your Honor.

THE COURT: Very good. Yes, sir. There's one person that didn't put his—

MR. STEINBERG: I didn't get to note my appearance, Your Honor. Scott Steinberg from the Law Offices of Scott Steinberg of counsel to Alter & Brescia. We represent defendant Barbara Callaghan.

THE COURT: Thank you.

MR. STEVENS: Mr. Steinberg is in category number four.

THE COURT: I was going to say I don't see that one in this category. The one I saw was Jan International. Who's here for Janice International and Janice Mini Storage?

*512 MR. STEVENS: Your Honor, as we've been doing with all these Janice cases, and I think the attorneys for the various defendants will perhaps reluctantly but back me up on this, have tried very hard to limit the amount of work that's been done so that we can focus, have a settlement focused, a discussion as opposed to a litigation focus point.

THE COURT: All right. Thank you. That's the only one unnoted. I saw the note but I wanted to see.

MR. STEVENS: Because they were out of town, significantly out of town and I didn't want to make—

THE COURT: It's just Atlanta.

MR. STEVENS: I don't know anyone from there, Judge. So I mean—

THE COURT: I know a lot.

MR. STEVENS: So we have—I actually—I said we've worked out an arrangement and I had agreed they wouldn't have to attend provided they put whatever costs there would be and gave it to me of course. Tongue and cheek, Your Honor.

THE COURT: I understand.

MR. STEVENS: I'm pleased to inform the Court, and again it's going to be subject to getting written terms, but it looks like we're very close to settlement on at least 10 of these 11. We've continued discussions that have been ongoing for the last four months and we've had some decent progress in the hallway. My hope is that we're going to be in a position—

THE COURT: So for me sitting on the bench this time things happen. Do I need to do that all the time? No. The answer is

MR. STEVENS: There's no right answer, Judge.

THE COURT: Go ahead.

MR. STEVENS: So I think that unless somebody wants to speak or address—

THE COURT: Does anyone wish to be heard on any matters that we—that has been categorized as settled and resolved, default judgments entered, Jerry Self Storage cases?

MR. STEVENS: I can't mark them as settled or resolved. They will tell you—

THE COURT: The first one, I meant the first one.

MR. STEVENS: You're starting on number one?

THE COURT: Yes. Number one, settled and resolved. Number two, default judgments entered, and number three, Jerry's Self Storage. I know those are not settled. I see that they're in settlement discussions but does anyone wish to be heard on these matters today?

Having heard none, we will reschedule those at some point in a minute. Okay. We're now at number four, active cases.

MR. STEVENS: We're at number four. First, I have one correction to note and Mr. Steinberg pointed it out to me and I failed to amend it on the amended agenda, but the first case, Barbara Callaghan is actually represented by Mr. Alter's firm to which Mr. Steinberg is of counsel. I have it noted as Mr. Steinberg's name. A firm is actually of counsel to record which is not correct.

THE COURT: Thank you.

MR. STEVENS: With respect to the first adversary proceeding, we have—

THE COURT: Wait a minute. Mr. Steinberg, you have your own firm but then you're of counsel to another firm?

MR. STEINBERG: Yes.

MR. STEVENS: With respect to that first adversary proceeding, Your Honor, last week we sent a proposed scheduling *513 order in our initial Rule 26 disclosures. We have not yet conferred with Mr. Steinberg to see if

the proposals and the deadlines that we proposed were acceptable. They're hoping to have a moment to do that today but—

THE COURT: Mr. Steinberg has risen.

MR. STEINBERG: The scheduling order is acceptable.

THE COURT: Very good. Thank you.

MR. STEVENS: That being the case, Your Honor, I could go through the dates or I could just give and say that we'll submit a consent order.

THE COURT: Please do.

MR. STEVENS: Excellent. Thank you, Your Honor. I believe the second case—

THE COURT: We might have to add some dates or do something at some point but okay.

MR. STEVENS: The second adversary proceeding I would suggest that we skip over because there's a contested matter with respect to the motion for default judgment and a contest have been filed in the JMR adversary proceeding.

THE COURT: When is that returnable?

MR. STEVENS: It's returnable today. Your Honor scheduled a hearing on Wednesday of last week scheduling it for today.

THE COURT: Okay.

MR. STEVENS: So it has been fully briefed.

THE COURT: And I do have my memos. I'm a little slow right now.

MR. STEVENS: The third adversary proceeding against Oritani Bank we've had discussions with counsel to Oritani who's sitting over here to my right, Mr. Catuogno. Mr. Catuogno—Oritani intends to file an amended answer to add John Magee as a necessary defendant and party to that action. We're going to have no objection to that and would be happy to stipulate to it but it also makes the discussion of a scheduling and—a scheduling order

premature because we're going to be adding another party. So the suggestion would be that we allow them to do that and reconvene once issue has been joined or there's been a default by the—

THE COURT: We'll work that out. All right.

MR. STEVENS: The final category I just classed as other because I did not have—it didn't fit in the other four I didn't think. So the first, 99 Roland Street, I didn't hear if anyone is actually here today.

THE COURT: Is anyone here representing 99 Roland Street, Park Ridge, LLC?

No, okay.

MR. STEVENS: Interestingly, Your Honor, issue hasn't been joined but they've been through three lawyers. These defendants, including my prior law firm, which is still actually counsel of record although they informed me in November that they were being replaced by Mr. Gareno's [Ph.] firm who I have second. The last voluntary extension in terms of the time to answer that was January 3rd. Our intent is unless—until we get them on the phone when we leave here and there is an agreement it would be acceptable to Your Honor that they answer and join issue that we need to move for a default judgment.

THE COURT: Well, not only move for a default judgment. I don't want—I won't excuse anyone from not appearing in this matter.

MR. STEVENS: Understood.

*514 THE COURT: So the next time we have a hearing I will expect a lawyer for this 99 Roland Street to appear in this Court.

MR. STEVENS: I will inform them.

THE COURT: And if you will let them know because I will definitely issue an order to show cause if they do not.

MR. STEVENS: I will inform them of exactly that, Your Honor.

THE COURT: Okay.

MR. STEVENS: The second, Priscilla Mulligan, Ms. Mulligan has defaulted. We have been approached by Mr. Magee's counsel who is trying to assist in the resolution of this adversary proceeding which we were happy to have those discussions. We've extended their time to file an objection to our motion for default judgment to January 25, 2013. If—

THE COURT: I think that's fine but there's a little bit of the same thing. She either needs representation or not. I don't—I think it's wonderful that anybody is trying to help with any kind of settlement but at some point somebody has got to stand up and say they represent her.

MR. STEVENS: Understood, Your Honor, and I'll relay that as well.

THE COURT: Thank you.

MR. STEVENS: And the third adversary proceeding is the complaint against Provident Bank and Mayer Hirsch. We had added Mr. Hirsch late in the game under an amended complaint and issue was just joined yesterday. Mr. Hirsch is represented by Mr. Condon who's here in Court today. Provident Bank is represented—

THE COURT: Bring it up right fast.

MR. STEVENS: I've made counsel tell me her name no less than 14 times today and I've rudely messed it up each and every time. So I'll say Cullen—excuse me, Provident Bank is represented by Cullen and Dykman.

THE COURT: Put it on the record again so he'll hear it.

MS. ABOULAFIA: Elizabeth Aboulafia.

THE COURT: Aboulafia?

MS. ABOULAFIA: Yes.

MR. STEVENS: I'm practicing in my head.

THE COURT: Okay. Good.

MR. STEVENS: Okay. I've got it.

THE COURT: But there's counsel—have you—you filed an amended complaint and given time for an answer?

MR. STEVENS: Yes. Both Mr. Hirsch and Provident Bank have joined issue. Provident Bank it appears, and I'm saying this subject to our review of the actual count formation documents but it appears that Provident was merely the bank where Mr. Hirsch held the account and received a transfer. We had read and interpreted it based on how it was written in the books and records and the bank statements as being a transfer directly to Provident for its benefit and named them as a defendant because of that. Once we get—if we get the documentation necessary to verify it Provident Bank will likely be stipulated out by agreement between us and Mr. Hirsch. And I'm sure Ms. Aboulafia is hoping that this is the last time that she has to come here.

THE COURT: Very good.

MS. ABOULAFIA: Thank you, Your Honor. We'll provide subject to receiving a document request from the Trustee since the bank has privacy concerns that they need a formal request before they can *515 provide the documentation. They will provide documentation to demonstrate that are mere conduit financial intermediary. We hope to stipulate to the dismissal of Provident as a defendant.

THE COURT: Very good.

MR. STEVENS: Ms. Aboulafia is being—I'm sorry, Your Honor. She's actually being very kind and not calling me out because they requested that over a month ago. Ms. McLoughlin drafted it and sent it to me and we just realized today that it stopped here and I didn't actually forward it.

THE COURT: Cup and lip—slip between the cup and lip.

MR. STEVENS: And that was my fault. So it is drafted. We'll get that written request so we can hopefully get that resolved very quickly.

THE COURT: Thank you.

MR. STEVENS: With that, Your Honor, that concludes the pretrial conference with respect to—

THE COURT: Let's talk about adjournments to any one of those matters that we might need to. When do you want to come back on those?

MR. STEVENS: Since we're going to be stipulating and there's a—either hopefully settling and resolving or stipulating to the addition of defendants. We're stipulating people out. It seems like there's—60 days would be an appropriate time to get all the things that we discussed here today done or not done and come back and move forward.

THE COURT: Understand. Understand. March the 5th for everybody in the courtroom? March 2nd is Texas Independence Day. I'd have a margarita or so but how about March the 5th?

MR. STEVENS: I'm sure that's fine, Your Honor.

MALE VOICE: Is that at noon time, Your Honor?

THE COURT: Please. This is abnormal to be so late. Were you all here the week before Christmas? We heard 924 matters and they were all on time but we've had had a lot of rulings today. Very good.

If anyone wishes to be adjourned on any matter that we have now adjourned to that date, they may be excused. Thank you. You have a good day and thank you for coming.

Now then—

MR. STEVENS: That brings us, Your Honor, to number two on the calendar. The second thing on the calendar is adversary proceeding number 12-9072, *Messer v. GMR LLC, et al.*

THE COURT: Okay. GR—GMR LLC, 12-09072?

MR. STEVENS: Yes, Your Honor. Did Mr. Ricci come here today? I'm asking. Mr. Ricci interposed a pro se papers.

THE COURT: I saw that. Mr. Gary Ricci. Is Mr. Gary Ricci in the courtroom? Mr. Gary Ricci. Have you been in contact with Mr. Ricci?

MR. STEVENS: We have, Your Honor. I did send to him the amended agenda along with everyone else. The one thing I would say that he wouldn't benefit from is to the extent that the ECF provides an additional notice he's certainly not registered with ECF but—

THE COURT: Why don't you stand and tell the Court since you're the one that spoke to him?

MR. STEVENS: She'll be the one testifying on most of the matters anyway.

*516 THE COURT: Testifying? You're a lawyer; correct? MS. McLOUGHLIN: Yes.

THE COURT: State your name and affiliation.

MS. McLOUGHLIN: Maeghan McLoughlin with Klestadt & Winters for the Trustee.

THE COURT: Ms. McLoughlin, you had something to say about contact with Mr. Ricci?

MS. McLOUGHLIN: Yes. I've been in contact with him. I spoke with him on Thursday and told him about the hearing today at noon in this courtroom.

THE COURT: And you—

MS. McLOUGHLIN: But I did not hear back from him.

THE COURT: Okay. Thank you. At any point—let me just ask you a question. At any point did anyone bring it to his attention that he cannot represent a corporation because he's pro se? Do you know?

MS. McLOUGHLIN: I have not spoken with him directly.

THE COURT: You don't have to. I was just curious.

MS. McLOUGHLIN: I have not told him. It was in our response to the Roncati objection which I emailed Mr. Ricci a copy of so that he would have it but I personally did not advise him.

THE COURT: That's fine. Thank you.

MR. STEVENS: If it please the Court I'll continue with the motion for default.

THE COURT: Certainly.

MR. STEVENS: Your Honor, we filed a motion for entry of default judgments and there have been responses and objections to those. To preface the matter because I know that this typically is a significant issue for the Court and I acknowledge all the case law and the Court's general disposition that everything be resolved on the merits when and if it can be. All of that stipulated and admitted and I'm saying that in preface to why I'm here and the fact that this is—I think it was in 2008 I stood before Judge Drain and said it was the first time in my career I ever held someone to a default when there was a contest. This is the second time in my career I've ever held someone to a default. It's not something we do lightly. I think we've waived numerous defaults already in this case. It's something we do only when one, we absolutely believe that we're being gigged. We believe that the party on the other side is just not taking it seriously or has intentionally decided that they don't need to respond or don't need to pay attention to papers that come from our office or from this Court and it's very much an intentional decision. We also only do it when we believe that there's nothing to be gained by going through the cost and expense of litigation. In other words, there's no meritorious defense.

To walk through briefly—I know Your Honor is—has received the papers and I don't want to rehash the things that you find in there but to go through briefly. One, there doesn't appear to be any contest that these groups of defendants were properly served. Mr. Ricci admits that it is in fact his address, the one that we did serve and serve by mail. He also admits that he had received a copy of the summons and complaint in October of last year. Mr. Roncati also admits that at least two of the addresses that we served summons and complaint—

THE COURT: Is Mr. Roncati here? Are you representing Mr. Roncati?

MR. WALKER: I am, Your Honor.

THE COURT: Thank you.

*517 MR. STEVENS: At least two of the addresses, both his professional address and his home address, were

correct addresses but says that with respect to the business address that that address houses many businesses and often mail gets mixed up and also states that with respect to the home address it may have—it may be the case that his housekeeper who is also in charge of collecting mail may have inadvertently thrown it out or misplaced it or something else. So we know that the addresses are correct. There is just a general statement that they didn't see it and know about it.

Now, with respect to Mr. Ricci, and Mr. Ricci as Your Honor noted earlier, put in an answer pro se on behalf of two entities which doesn't appear to be in contest that that's not something that's permissible but Mr. Ricci says I got the papers in October. Whether he says he got them properly or improperly he admits that he has them in October of 2012 yet he did not file an answer. He did not call our office, email us, reach out in any way until December 3, 2012. So there's admittedly over 31 day lapse, at least. If he were to receive it the last day in October in the month that he says he received it and doesn't call until December 3rd there's at least a 31 day lapse—excuse me, it would be a 33 day lapse between his receipt, acknowledged receipt of this document and reaching out to our office to ask for an extension.

THE COURT: Over a month in other words.

MR. STEVENS: Exactly, Your Honor. Now, Mr. Roncati says that he actually didn't know about the adversary proceeding until—I believe he said he was told about it by a colleague. I would assume he's referring to Mr. Ricci but he didn't know about it. But the issue we have with that is not only do we serve it two addresses and make good service but we have a history with Mr. Roncati that makes that statement very, very difficult to believe.

First, documents that have been sent to Mr. Roncati's address, including service of our summons and complaint in the *Messer v. Magee* adversary proceeding back in September of 2011 were simply returned with our firm name circled and refused written on it. So we have a—I'm not saying he was supposed to accept service for these people. What we have a history of an identifying the name on these envelopes and somebody writing refused on it very intentionally and sending it back. That's one example.

The second example that's more recent and I think more profound is Mr. Roncati was served with a third party

subpoena recently in the *Messer v. Magee* adversary proceeding compelling his—the production of documents by October 31st and his deposition in our office on November 14th. Mr. Roncati did not respond and did not produce documents by October 31st. So we Fed Ex'd Mr. Roncati a letter noting the default. The letter was received by his business address and was signed for by someone we've identified via his website as an associate and a member of his architectural firm and again we received no response. On November 12th Ms. McLoughlin places a call to Mr. Roncati's offices and the person she speaks to when she asked to speak with Mr. Roncati and says who she is says hold on, he just came in and let me go—let me go tell him you're on the phone.

After being left on hold for a period of time Ms. McLoughlin is taken off of hold and is told that he's never heard of you, he's never heard of your firm, he's never heard of the FKF case and he's not going to speak to you. So Ms. McLoughlin replies well, he should know, we've served him with a subpoena, have him call me. *518 His deposition is scheduled to take place in two days.

Then—we admit it's the case that we received a message from Mr. Shaw's law firm the following evening, November 13th.

THE COURT: So right after that?

MR. STEVENS: Right. Within—the following evening. So that was November 12th and November 13th a message is left on Ms. McLoughlin's voice mail saying that Mr. Roncati won't be showing up to his deposition and that—and announcing themselves as potential counsel for Mr. Roncati.

THE COURT: So at that point it's still potential counsel? Okay.

MR. STEVENS: We unfortunately didn't collect that message until I sat in the conference room with the court reporter for about 30 minutes. Noted Mr. Roncati's default and failure to appear. Then we noticed that the red light on Ms. McLoughlin's phone was on and there was a message from yesterday evening. Of course no attempt to give written notice that he would not be attending that day or to make sure that there's human contact with our office or some other form of communicating. His just stated

intention he's not going to show up. Not a request. Just I'm not going to be there.

So following that we had conversations with Mr. Roncati's potential counsel where it was requested that we extend the time to respond to our motion for default judgment which we agreed to. We were not willing to waive the default. We still are not willing to waive the default but we agreed to an extension of time so that they can answer and state—tell us why you didn't reply and also tell us what your defense is going to be.

By December 18th and in between this point in time and December 18th Ms. McLoughlin reaches out several times to schedule a deposition and to get that back on—the matter back on track in the *Messer v. Magee* adversary proceeding because as Your Honor knows and we'll hear in a moment we're facing a February 1 discovery cutoff and we need to get these things done and doesn't actually hear from them until December 18th when she's told by counsel that their client is not—has been I think—I don't what the words he used were but has not been returning calls and they have just gotten in contact, are now able to confirm this date for deposition.

At this time I'll state we still do not have a single document production from Mr. Roncati but we do have an agreement and confirmation that he will be appearing in our offices on Thursday, two days from now at ten a.m.

THE COURT: Two days from today?

MR. STEVENS: Two days from today for his deposition, third party deposition in the *Messer v. Magee* adversary proceeding.

So based on the history with Mr. Roncati and his refusal of service and what appears to be a clear admission that service was proper and also with Mr. Ricci who on his own admission had these papers for over month, we don't think there's any question that the defaults were willful. There's no question certainly in our minds that we are being gamed. At the very least they see mailings and papers from our office and don't think it's worth reading them, opening them or looking at them and I don't know what the logic is or the reason behind that but it seems to be a common theme. I will say we've had many adversaries both here today and throughout this case, none of which have claimed to not received things from our *519 office

or received what is usually many, many attempts to get in contact with people before we come here. That's point number one.

The second point, Your Honor, is that we do not see a meritorious defense. To summarize what this claim is about it very simple resolves one transaction. Most of the parts of the transaction are not contested. FKF 3 loans \$1.5 million to GMR pursuant to a promissory note and related agreements. That obligation is guaranteed by Mr. Ricci and Mr. Roncati. This takes place in April 2006. \$1.1 million of that \$1.5 million principle is given to GMR or its designated recipients. Another \$400,000.00 of the \$1.5 million is set aside as collateral for the repayment of the \$1.1 in this cash collateral account.

By August of 2006, so just four months later, there's a decision that Mr. Ricci is going to be removed from the deal, that Mr. Roncati is going to take over Mr. Ricci's interest in what is the Aventine Edgewater project and in exchange for the transfer of his ownership interest to Mr. Roncati, Mr. Roncati is going to, among other things, take over this loan. What happens in this document we call the purported release—because until one month ago we still had not seen a signed copy of it. Now we've seen a copy that appears to have Mitchell Klein's signature on it on behalf of FKF 3 but pursuant to this purported release the obligations of GMR are transferred and assigned to Ariston Properties which is a company owned by Mr. Roncati whereas GNR was owned by Mr. Ricci and Mr. Ricci and Mr. Roncati are released from their obligations under the guarantee.

To start with, we have a number of issues with the written document. Even if we assume, even if we assume that this document is what it says it is and it was signed by Mitchell Klein, he document in the context of this series of transactions it makes sense that Mr. Ricci would be receiving a release because he's walking away from this deal. It makes absolutely no sense that Mr. Roncati would receive a release and the terms and the language of the document reflect what appears to be almost a carroting in of Mr. Roncati's name. Paragraph 5 of this purported release is what gives the release to the guarantors, to Mr. Ricci and Mr. Roncati.

But if you read further, Paragraph 6 states a clear reaffirmation of any obligations Mr. Roncati has—

THE COURT: Let me interrupt you, Mr. Stevens, and I'm sorry to do this. Mr. Sapir, I said don't take adjournments. This is going to go on. Go take adjournments.

THE COURT: Go ahead.

MR. STEVENS: I'll try to be—so Mr.—

THE COURT: You don't have—they're taking adjournments now.

MR. STEVENS: So Paragraph 6 of this purported release, Your Honor, reflects a whole different context. It states that even though—dispute Mr. Ricci's release Mr. Roncati reaffirms all obligations that he has under the loan documents and is not—a notwithstanding type paragraph reaffirming Mr. Roncati's obligations.

Paragraph 9 does exactly the same thing making Paragraph 6 and Paragraph 9 completely conflicting with Paragraph 5. Mr. Ricci's release, although we think that it makes contextual sense that he would be a part of this release, is equally confusing because if you read the release paragraph it says Mr. Ricci is not released from any obligations that accrued before the date of this document which would be all the obligations due under the loan documents.

*520 I'm pointing that out to say that we have with—even if we assume and even if a fact finder at some point in time were to say—or excuse me. That, first of all, there's a number of issues with the document. Set that aside for a moment. We pled in the alternative. We said even if the Court ultimately finds or the fact finder ultimately finds that this release is a valid and binding document against FKF 3 and Mr. Ricci and Mr. Roncati were indeed released by it and at that point in time we hadn't seen a signed copy but we're assuming maybe a signed copy surfaces at some point and it ultimately did, that even if it doesn't matter because the release itself is a fraudulent conveyance to FKF 3. It makes absolutely no—this transaction is the silliest thing from FKF 3's perspective that you could possibly imagine.

According to this transaction FKF 3 in the assignment of the obligations from GMR to Ariston and the release of Roncati and Ricci as personal guarantors, FKF 3 receives zero, nada, nothing in this transaction and they lose two individual guarantors on a loan. They lose a

corporate guarantor on the loan and they in fact give another \$226,583.34 out of their own collateral and give it to Mr. Ricci which apparently we have yet to understand. It apparently is some flow of consideration we're assuming for Mr. Ricci's transfer of his equity interest in Mr. Roncati and the project. But it makes no sense. We looked very clearly. FKF 3—giving these releases to these two gentlemen was an absolute fraudulent conveyance. What consider did FKF 3 receive? That allegation has not—neither Mr. Ricci or Mr. Roncati have said what they gave. There is no—they haven't stated a defense to that. Even if this weird questionable bizarre release actually has some meaning and is a real document and the Court says I'm dismissing your arguments with respect to these ambiguous provisions that make no sense why is it not a fraudulent conveyance. It is a clear fraudulent conveyance. FKF 3 got nothing and they haven't even said FKF 3 got nothing. They haven't even addressed that allegation.

So we cannot see where certainly Mr. Ricci and Mr. Roncati where they have a meritorious defense. This issue gets highlighted even more when you look at the Ariston obligation. Interestingly, we—

THE COURT: Refresh me on Ariston. That's Roncati?

MR. STEVENS: Mr. Roncati's company. Under the purported release was assuming the obligations of GMR.

THE COURT: Right.

MR. STEVENS: This is interesting, Your Honor, because Ariston we sued for \$1.1 million. We did not sue them for the full \$3.2 and change that we believed to be due under the loan documents because it's our allegation the purported release is a non existent document, assignment never happened. So we've sued Ariston only as a beneficiary of the identified transfers that were made by FKF 3 to the GMR borrowers.

Now, Mr. Roncati says that the purported release was a real live signed agreement and it's effective. Well, if it happens to be effective then we're wrong and Ariston actually owns—owes in excess of \$3.2 million, not the \$1.1 that we've sued on. But interestingly, what he said is that Ariston doesn't actually owe FKF 3 the money except to the extent of the value of the pledged collateral of one development's membership interest in the Aventine

project. The argument makes no sense and they don't even try to correlate it to any written documents. The ones that they're submitting are the ones that were annexed *521 to the complaint. The argument makes absolutely no sense. If that argument is true FKF 3 gave one point and admitted \$1.5 million in actual value in 2006. Nobody ever tried to service this note. There's not a single interest payment ever made, not a single principle repayment and FKF 3's only recourse to get this money back is to foreclose on membership interest that—and one development Edgewater has in the project.

THE COURT: Mr. Stevens, let me just hear you carefully for a moment because I'm listening and you have said no meritorious defense and I'm listening but you've outlined some very complicated issues in your papers and what you said today. So how is it that I can rule on the default when what you're saying to me is fairly complicated?

MR. STEVENS: I think that the—the way that I'm explaining the issues and there would be a number of complicated issues. I think the one place that nobody can get past is that the—the release was a fraudulent conveyance. We alleged it very clearly. If that release exists which we didn't think it did at the time—

THE COURT: You haven't seen it.

MR. STEVENS: We've now seen it because it was annexed to Mr. Ricci's response and then adopted by Mr. Roncati. I will say that Mr. Roncati in 2010 when requested by our predecessor Dave Seckler was asked to pay this obligation. Mr. Roncati said no, there's a release and Mr. Roncati produced a release at that time. That was a black lined copy of the signed release we're now being given but was signed by everybody except for FKF 3. So what we had until a month ago only was a black lined copy of a release that was not signed by the one person who was to be charged by it.

But here's the reason why you can cut through all those things. I've perhaps been over broad in sharing all the bizarre issues and the problems and I've done it for a specific reason which I'll tell you. But the one thing they can't get by is it's okay, this release exists. It's a fraudulent conveyance. Why is it not a fraudulent conveyance? Tell us what consideration Mr. Roncati gave. They haven't even alleged that he's given consideration. There's been no address to that allegation and what was outlined in

actually three separate causes of action as the fact that okay, if this release exists why is it not a fraudulent conveyance. This transaction is nonsense. FKF 3 received absolutely nothing. If there's a defense we certainly haven't heard it.

So I agree that if—with respect to the document itself we've highlighted those issues only to show that there's tons of issues there.

THE COURT: But the real thing for you is the consideration.

MR. STEVENS: For us today right here and now, right. They haven't even tried to answer the fraudulent conveyance claim, the claim that the purported release even if there's a good document and the Court does not care about any of the ambiguities or all of the complex problems we point out with it why that release is I can't avoid it fraudulent conveyance, why I can't shred it up, throw it out and say pay me the money that you borrowed.

THE COURT: Okay.

MR. STEVENS: That's where it all goes back to. It's the same thing—the reason I was getting into the Ariston stuff which is where I think I started to lose myself a little bit if not the Court, with the complexities on the Ariston side but the Ariston stuff I was pointing that out to say the complexities there aren't by us. The *522 complexities there are manufactured by Mr. Roncati because the complexities are—if Mr. Roncati's allegation is right there's a clear document where Ariston assumes obligation to pay this note it's a no brainer. I mean that's an easy one. Still we're manufacturing an incredibly bizarre defense that has no support, or at least none that's shown and none that I've seen in the 50 times I've read these documents that would say that FKF 3's limited to collecting against an admitted obligor on an obligation to the extent of a collateral basis—it just makes no sense. I was actually highlighting more to show that the—if anything a disingenuous or lack of intellectual honesty in making—taking positions and making claims and claiming defenses.

We just can't possibly see a meritorious defense to—even if you see that there's one I admit we can argue about the document—the contract all day and that's something where we could at the very least have summary

judgment motions and all that stuff but it doesn't matter because there's been absolutely no answer to the fact that the release if it exists is a fraudulent conveyance. What consideration was FKF 3 given? No allegation that no, they were solvent at the time. Nobody is saying that.

THE COURT: Okay.

MR. STEVENS: So, one, we think we're being gamed. We think the defaults were willful, that there was at the very least an attempt not to open anything or bother reading anything that came from our offices because we've been targeted as being an enemy and that there's—nobody wants to look at those things. Mr. Ricci admits to having a document for a very long period of time and doing nothing.

THE COURT: Your associate also made the phone call?

MS. McLOUGHLIN: Yes.

THE COURT: You heard what, your colleague said is that what happened when you called?

MS. McLOUGHLIN: Which phone call?

THE COURT: The one where you called and they said I don't know you, I don't know your firm, I'm not going to do anything?

MS. McLOUGHLIN: Yes, that's exactly what happened.

MR. STEVENS: That was stated in Ms. McLoughlin's affidavit that we submitted which—

THE COURT: I understand that she is here now.

MR. STEVENS: Which I would ask to submit as direct. She is here to be cross-examined if anyone has an issue. I don't know that we have issues with respect to those exchanges.

THE COURT: I don't either but I just wanted to make sure that who did it and where—I know about the affidavit.

MR. STEVENS: The third element and I want to sum up very quickly of course is the prejudice that we think will come to FKF 3. The FKF Trust is a trust that is

seeking recover on account of admitted fraud victims. They have—these are folks that many of which gave their life savings over to FKF 3 under pretenses they would allege—that's been an allegation that's been played out in this Court in multiple settings and of course is the subject of additional litigation but the point is this is the prejudice that would be felt by the FKF Trust if it has to spend money with a case and then prosecuting a case to which there's no meritorious defense and you have defendants and parties sitting on the *523 other side who are simply not respecting processes of this Court.

We'd also state as a monetary prejudice that—and we have not compounded, Your Honor, and I read—I like to read papers clearly—liberally as possible that favor my client's position. We were pretty conservative here. I couldn't find a reason to compound interests or a contractual basis to compound interests. So we've only, only accumulated interest on the \$1.5 million principle and we never compounded. Again, could not find a contractual basis to do so. We still are continuing to accrue interest at \$821.92 every single day on the \$1.5 million principle and nobody is stating—nobody is coming to the Court and saying well, we got these meritorious defenses and here's some protections we can offer. If we're wrong, you know, we're going to be stuck with probably by the time we got done with this a \$4 million obligation instead of a \$3.3 and there's no—there's—we can't see any way or certainly have not been offered any idea how we're not going to be prejudiced by that and having an additional obligation.

So, again, we believe that we have been prejudiced by the default. We'd be prejudiced by lifting the default and allowing these matters to go forward. With that stated, Your Honor, I think I can stop talking and let Mr. Roncati's counsel make a presentation unless Your Honor has questions.

THE COURT: I have one. Excuse me. You may be seated. No, I don't—before you stand up. The Briggs matter, what have we got? Everybody can stay exactly where they are.

[Pause in proceedings.]

MR. WALKER: Good afternoon, Your Honor.

THE COURT: Good afternoon. You're going to have to pull that microphone up so we can hear you.

MR. WALKER: Hazard of being my height, Your Honor. So I feel the need to

THE COURT: State your name and affiliation for the record.

MR. WALKER: I'm sorry, Your Honor. Romain Walker from the Law Office of Charles Shaw on behalf of defendant Conrad Roncati and I'm sorry. Ariston Properties.

I feel that is somewhat incumbent upon me to rehabilitate Mr. Roncati's reputation which has been somewhat maligned for the last 15 minutes or so. I'll begin with—

THE COURT: Let me be a little clear about that. Not the last 15 minutes.

MR. WALKER: Okay.

THE COURT: It's been ongoing since this case was filed.

MR. WALKER: I see.

THE COURT: So don't—you need to understand that this Judge has already been aware of the fact that this has not been answered. So why don't you cut to the chase and go to the meritorious defense and then you can fall back on the other but I want to hear the meritorious defense.

MR. WALKER: Certainly, Your Honor. Well, from what I've heard—well, let me start with just a brief synopsis of the standard. For a meritorious defense it's not incumbent upon the defendant to prove his case in totality, to prove the facts are absolutely true. It's simply to present a situation where the fact finder may find that there is a dispute here or there is an issue to be resolved.

THE COURT: Right.

MR. WALKER: Now, having said that, the central issue seems to be what consideration *524 was given to FKF for Mr. Roncati's release. That is the factual question. I am not exactly sure of the consideration but I've had a discussion with Mr. Roncati and I can speculate. One possible situation is that FKF requested that Roncati take over Mr. Ricci's duties and the management of the project. This was negotiated, the terms of this was negotiated. It was negotiated between the parties. FKF may have felt

that it was worth the release of Mr. Roncati to have him as an architect to take over the project. Now, again, I say that as just a sort of off the top of my head speculation but the greater point being that that is a fact about which there's no record. There's nothing before the Court. That is something to be determined.

What the Trustee would like to say is that this absence of this—any such record necessarily means that there is no—there was no consideration and that simply can't be the case. That is a factual determination being made in the absence of facts. It is simply to say that we're looking at a document here which taken at face value which I think is appropriate that we do at this juncture, taken at face value removes liability from Mr. Roncati and potentially limits the liability of Ariston Properties. That is sufficient to meet the meritorious defense standard.

It is not incumbent among us to expand and answer every single question that opposing counsel may have about the nature of this document, underlying negotiations and so forth. So I'll stand on that.

Now, with regard to—I'll just briefly discuss prejudice.

THE COURT: Okay.

MR. WALKER: I think it's clear here that a weighing of the prejudice certainly—it certainly weighs in favor of the defendants here. On the one hand we have the prejudice being asserted against plaintiff being that interest is being accumulated. I personally fail to see how accumulated interest is a prejudice in that you're gaining more money over time. I fail to see how that is prejudice because theoretically you're supposed to recover that. Now, conversely, when you look at defendants we're looking at a \$4.2 million judgment, a \$4.2 million judgment in the presence of a document which if taken at face value would absolve him of liability. I don't see how you can weigh the prejudice and end up in any other way except that—the prejudice to defendant would certainly outweigh the prejudice to the plaintiff.

Now, with regard to service, Mr. Roncati's certification was a long winded way of saying I don't know what happened to the documents. I never received them.

THE COURT: So what's the standard on service?

MR. WALKER: The standard on service is that it has to be willful and willful is there has to be more than mere negligence.

THE COURT: It's good mailing is what service is.

MR. WALKER: Oh, certainly, good mailing, but in terms of—I'm sorry, I'm determining the standard as for willfulness, willful disregard or willful default, and that standard is beyond mere negligence. Now, I don't think we can get beyond mere negligence here. I'm briefly going to reference the affidavit of service with regard to the subpoena which was discussed at length.

The subpoena, the subsequent conversation between Mr. Roncati and Ms. McLoughlin. The subpoena states or the affidavit of service for the subpoena states that it was received by a Ms. Smith, approximately 34 year old Asian woman of *525 52C6# height. I've spoken to Mr. Roncati yesterday after receiving this and he advises me that there is no one in his employ who has that name and matches that description. So to me it seems reasonable that someone calls about it, you say I've never heard of this, I don't want to talk to you about it, I don't want to get pulled into this litigation.

Now, we have this other litigation where Mr. Roncati is scheduled to give a deposition which is the subject of this subpoena and I personally can see being confused as to what is what. There's—the parties or the plaintiff's names are very similar. Some of them you have to respond to; some you don't. I think it's reasonable to say that it was negligence that caused him to either disregard, ignore, overlook these documents but we have here now is that he was—when he's finally made aware of the gravity of these proceedings he contacted his attorney and we find ourselves here today. I think in totality when you consider everything I think default judgment of \$4.2 million would be uncalled for unwarranted. Thank you, Your Honor.

THE COURT: Thank you. Who would like to be heard next?

I will just make a couple of brief—

THE COURT: Is Mr. Ricci in the courtroom? Mr. Ricci. Very good. Mr. Stevens.

MR. STEVENS: I just had two brief points for this respondent.

THE COURT: Sure.

MR. STEVENS: The first is a statement—

THE COURT: Excuse me. Let the record reflect it is now 2:35 on a matter that was to be called at noon and the Court has been in session pretty much that entire time. Go ahead.

MR. STEVENS: The first point I wanted to respond to is that—I'm 62C1# and I have to lower this back. Is that the fact that there's an absence of a fully developed factual record. That's an admission, Your Honor, but the record Your Honor has was a clear opportunity by the parties to say whatever they want to say. It doesn't even have to be believable. It just has to be a story and I admit that. My point with respect to the response to the allegation and accounts and the claims in the complaint that the issuance of the release lacked fair consideration, it was a fraudulent conveyance, there is absolutely no response to that. There's not even a general denial anywhere found in the papers submitted by Mr. Roncati to that allegation. Now is the chance to—it doesn't have to be a fully developed factual record. There just has to be—someone has to give Your Honor something. There should be something in these written papers that let's us know you know what, I don't agree with that and that wasn't there.

In fact, Mr. Walker is standing here today and saying that he can speculate that maybe there's something but we've had an opportunity here. So of course there's not a fully developed factual record. Your Honor is not making findings of fact based on the allegations in the complaint but what the Court has to look at says absolutely nothing. That's your opportunity. Why bother answering complaints if we can just go and try them without doing—we need to know what's in contest and what's contested and that has not been contested. That's the response to that one issue.

The second has to do with prejudice in the accumulation of interest. I'm just going to put to the cites. I had them laid out in my papers but the accumulation of interest that may—where the delay may thwart the plaintiff's ability of recovery or *526 remedy is in fact a prejudice that fits under that bill in the Second Circuit criteria that's set forth in *New York v. Green*, 420 F.3d 99, 110 (2d Cir.2005). That was also—we found that in a decision by

Judge Castel in *Paul Saleh v. Albert Francesco*, 11 Civ. 438 (S.D.N.Y. Nov. 10, 2011) and the bench memo is found at Docket Number 29 where Judge Castel used the exact same criteria adopted in *New York v. Green Standard* and it was the exact same thing there. The plaintiff was going to be prejudiced. Their ultimate ability to recovery was going to be thwarted because there was no sign. If Mr. Roncati came in and said I have \$5 million in the bank that you can go against then true, there would be no prejudice because we're going to be able to collect whatever can we foresee as the accumulation of interest. Nobody said anything like that and in fact I think we can fairly safely assume and can absolutely assume from the record and what's before the Court that we're not going to be able to collect that and that we're going to accumulate interest we're never ever going to get paid on.

THE COURT: Very good. Does anyone else wish to be heard? I will give you a written opinion.

MR. STEVENS: Thank you, Your Honor.

THE COURT: Thank you. Thank you. When are you coming back? Not—we don't know if you're coming back. You'll get a written opinion. When are you coming back on just a regular day?

MR. STEVENS: We still have to get to the last—

THE COURT: Excuse me. I apologize.

MR. STEVENS: I'll breeze through this. I promise you.

THE COURT: No, you don't have to breeze.

MR. STEVENS: I'm not promising them. I'm promising you.

THE COURT: I was going to say the hecklers over here on the sides, ignore them. What have we got?

MR. STEVENS: Third and final thing on the calendar and there are—two uncontested matters. First the pretrial conference. The second is our motion. Adversary proceeding *Messer v. Magee*, Adversary Proceeding Number 11–9074.

THE COURT: I thought you all were just interested in me making an edict of some sort which I neglected to do for

you. What do we got? I'm sorry. You got the last ones on the agenda.

MR. STEVENS: This is—and I'll follow with a motion, Your Honor. I'll go quickly through this because Your Honor has been very closely monitoring discovery since this case was commenced in September 2011 and discovery has been heated up since the summer. We're also facing our fact discovery cutoff of February 1st. So we're on a pretty tight time clock here to get things done.

THE COURT: Right.

MR. STEVENS: The developments—first I'm going to skip over subsection C in Exhibit B4 in going through our status notes. I'll address that in the motion. That's amended pleadings. We do have a motion for leave to file our first amended complaint today.

I'll skip to the motion to withdraw the reference. That motion has or is to be withdrawn without prejudice by Mr. Magee. The idea being that—

THE COURT: Who's representing Mr. Magee?

MR. P. BURKE: Your Honor, I can speak for him today.

*527 THE COURT: Okay.

MR. P. BURKE: We sent a letter—

THE COURT: Sate your name for the record.

MR. P. BURKE: I beg your pardon, Your Honor. Patrick Burke. For the record, counsel to Magee children. I'm speaking today on behalf of John Magee.

We sent a letter after former counsel was relieved by the Court to Judge Karas indicating to him that we would withdraw the motion for—withdraw without prejudice with the Court's permission and just waiting to submit to Judge Karas an order to that effect.

THE COURT: Okay. Thank you.

MR. STEVENS: So for the time being that motion is off the table subject of course to any of the defendants' rights to refile.

Discovery is moving along at a very rapid pace. We have—I'm going to skip through the initial disclosures. Deponents and tell you exactly where we are with depositions. Party depositions, Mr. Magee has now been fully deposed by our side. We deposed him over a four-day period in November and December. We have added two additional party depositions, Elizabeth Keith and Jonathan Magee and deposed non party Ira Shapiro. Upcoming this week we have Mr. Roncati on Thursday, Allen Feldstein on Friday. Mr. Dorfman will be next Monday and Tuesday and may continue on. Of course Mr. Haspel reserves all rights to complain about that, and then Mr. Robert Caulfied on January 22nd.

We still have an number that we have noticed and are trying to get scheduled. Therese Magee, a party defendant, has some medical issues so we're trying to accommodate those and get her deposed at a time that's appropriate and we may in fact be asking Your Honor for—

THE COURT: For an extension?

MR. STEVENS: For one limited purpose fact discovery so that we can accommodate—

THE COURT: I understand that but I would like to know a little bit more about the medical condition before I would extend it if they—yes, sir. Mr. Burke?

MR. P. BURKE: Do you want to know it now, Judge?

THE COURT: That's fine, yes.

MR. P. BURKE: She's got [cancer](#).

THE COURT: Okay. That will more than likely warrant an extension.

MR. STEVENS: And Jason Klein and Lorette Klein, both of which are now have retained Blank Rome who have been representing Mitchell Klein, one of the primary named defendants in this action. They're now being represented. We have been unsuccessful in scheduling their deposition. Of course they had each received proper service—excuse me. Jason Klein did not receive proper service subpoena. We had issue serving him but there was an agreement to schedule his deposition for him to come in voluntarily. Ms. Klein has received service of a subpoena. It is supposed to be scheduling but we're having a few hiccups in terms of getting that done and need to obviously

get it done this month. If we have any more hiccups I may be flying in here and bothering the Court with that issue.

THE COURT: I would need those that represent these to be with you to tell me why the schedule was not met but not just you. Okay?

MR. STEVENS: Understood, Your Honor.

THE COURT: Thank you.

*528 MR. STEVENS: Mitchell Klein, named defendant, is to be scheduled. We're still conferring amongst the parties that are actively litigating whether Mr. Klein will be deposed in person or whether he would be deposed on written question. The reason being is he had unequivocally stated that with respect to any question other than what's his name and where does he live he's going to plead the Fifth.

THE COURT: Plead the Fifth?

MR. STEVENS: Yes, Your Honor.

THE COURT: Do we think we have a criminal prosecution going on here?

MR. STEVENS: We do not yet but—

THE COURT: It might be a possibility?

MR. STEVENS: I think some would classify it as inevitable but it's a distinct possibility.

THE COURT: I think this is the first time I've heard that even though I don't disagree but I don't remember ever hearing that there might be a criminal prosecution.

MR. STEVENS: We—I recall talking about it quite a while ago. It's been a long time but—

THE COURT: Now you say that I remember.

MR. STEVENS: The U.S. Attorney—and it's known to everybody in the room. The U.S. Attorney and the FBI have an active and open investigation going. They have not—there have been no indictments. There have been no arrests but there is an active ongoing investigation in this matter.

THE COURT: All right.

MR. STEVENS: So Mr. Mitchell Klein—and he's taken this position for quite some time with us which is why we never deposed him under 2004 that he will be pleading the Fifth. So we're going to decide whether or not we're going to do that in written question or spend time with him.

THE COURT: Sure.

MR. STEVENS: The weekly conference call is that Your Honor ordered back in the fall—

THE COURT: Nice.

MR. STEVENS: —have been extremely effective in getting the parties—

THE COURT: Are we continuing them?

MR. STEVENS: We have continued. We've had every single one.

THE COURT: Congratulations. Did you all say Happy New Year to each other?

MALE VOICE: No, he didn't.

MR. STEVENS: Your Honor's order did exempt us from both—because they're Tuesday 8:30 a.m. So the order did excuse us from the Christmas call and the New Year's call. So we haven't had one today. We had one in the hallway and that was what we previously agreed to.

THE COURT: Thank you very much.

MR. STEVENS: We've also stated that we are going to discuss stipulating subject to Your Honor's approval to moving those to bi-weekly once fact discovery closes.

THE COURT: We will let you bring it up at that time.

MR. STEVENS: So those have gone forward. We have—I can't say thankfully that I've actually successfully produced, timely produced agendas and notes to those which I was required to do under the order. It was—

THE COURT: Ms. Fredericks, we're all looking at you.

MR. STEVENS: Pardon?

THE COURT: No, I'm teasing her. Good.

*529 MR. STEVENS: That was what I called Mr. Goldberg's last stand was pushing that in the order and giving me some extra work before he left us in his—and no longer involved.

THE COURT: But it is nice to have the agenda. It does make it simpler for everybody.

MR. STEVENS: I agreed to it because it was appropriate, yes, Your Honor.

THE COURT: Yes. Thank you.

THE COURT: But I will complain about it.

THE COURT: Okay.

MR. STEVENS: Upcoming dates and deadlines just to keep the Court aware, we have a February—

THE COURT: Yes, I saw that.

MR. STEVENS: —1st fact discovery cutoff, a March 1st deadline to meet and confer regarding what experts we're going to use and subject matter of the expert testimony. Until May 3rd to complete expert reports and exchange them and then June 28th will be the time to complete expert discovery after which we should be prepared to have that final pretrial conference and ready to file our motions in limine and be trial ready.

THE COURT: I need to do something—you need to do something for all of us and for you and for everyone else in the audience. If we have something that is extensive we need to just specially set it. Otherwise this time is good but we can also hear you on Thursday or Friday. So you all need to help me with that because I do hate to keep people from their employment or whatever.

MR. STEVENS: I apologize. I will do that.

THE COURT: No, don't apologize. It's just—it's my fault. I do the scheduling. I mean we do the scheduling.

MR. STEVENS: It's not. Ms. Fredericks has to call me and harass me for the agenda which I should be forthcoming with.

MR. STEVENS: That's why I was teasing her. You have to—

MR. STEVENS: Please don't tease her because it is all on yours truly. Believe me.

THE COURT: Well, she protects me.

MR. STEVENS: I'm not directing the Court not to tease the courtroom deputy. I mean you can do what you want—I don't want her to hold it against me. I'm not doing it.

THE COURT: But she will. Trust me, she will and she'll get mad. Okay. So when do you want to see me again?

MR. STEVENS: I believe—well, we do have one more matter. Let me fly through it. We have a motion for leave to amend, file a first amended complaint. The motion is uncontested. The two counts that we're seeking to add—and I streamlined it. I streamlined. I started the amended complaint at the paragraph where we left off in the initial complaint so that we're not forcing people to reanswer another 240 pages of—

THE COURT: And my understanding is that's unopposed.

MR. STEVENS: It is unopposed, Your Honor.

THE COURT: Very good.

MR. STEVENS: Excellent.

THE COURT: Submit an order and I'll allow that.

MR. STEVENS: I will, Your Honor.

THE COURT: Now, when do you want to see me again?

*530 MR. STEVENS: The one matter was adjourned to January 29th. That was the NCP matter.

THE COURT: But I don't think that we have to bring everybody back. It's just what's according—what do you want to do?

MR. STEVENS: The only thing I would want that date for, and I would love to keep it with the caveat that we could adjourn it if we're all on the same page and everything is fine, is—

THE COURT: As long as you all are talking to each other I will let you.

MR. STEVENS: If I have a discovery issue and need an extension of the fact discovery cutoff—it may not involve everybody here. It may involve just a recalcitrant third party witness perhaps.

THE COURT: Or an ill patient. That—bring it by then. Bring it by January 29th so we can hear it then. Yes, sir.

MR. HASPEL: Your Honor, you're going to be receiving a motion with a motion to shorten time with—addressing the depositions of Mr. Dorfman. It's prepared. I was hoping to get to the Court today but I don't think I'm going to be able to do it at this point. We're not seeking to stop the deposition that's on the schedule by the Trustee. However, in the state court proceedings that are related after some time Judge Jamison entered an order which effectively indicated that based upon Mr. Magee's wrongdoings in stealing Mr. Dorfman's files he's going to be precluded from certain events which I don't want to go into at this point in time.

THE COURT: Sure.

MR. HASPEL: What's going to be presented to Your Honor is to effectively adopt Judge Jamison's ruling for Mr. Magee's conduct because it's—what discovery was going on in that case is the same as the discovery that's going on in this case.

THE COURT: File it. Mr. Stevens will respond.

MR. HASPEL: Like I said, I don't think it has anything to do with Mr. Stevens.

THE COURT: Or Mr. Burke. Whoever needs to—

MALE VOICE: It has more to do with the Magee, Your Honor. We have been waiting for this shooted draft for months and now when we're going to get the draft—

THE COURT: In three weeks.

MALE VOICE: Tuesday we're supposed to be down in Mr. Stevens' office on Monday to conduct Burt Dorfman's deposition. I don't think that's fair. I don't mind responding, Mr. Haspel, to what you say.

THE COURT: Shortening time between now and Monday?

MALE VOICE: Yes. I've got no time to—

THE COURT: You can do it. I won't tell you that you'll be favorably possessed for it but I'll always look at it.

MALE VOICE: We're not seeing to stop Mr. Stevens—

THE COURT: I hear you. I hear you.

MALE VOICE: —deposition from going forward. That's —

THE COURT: I hear you. It is Wednesday. We'll deal with it if it comes our way.

MR. STEVENS: Thank you, Your Honor, and your notes regarding scheduling are heard and let me apologize to the folks—

THE COURT: Yes, apologize to everybody. Thank you. I don't—we don't mind *531 but it's really tough on people that have to be out of work.

MR. STEVENS: I understand, Your Honor.

THE COURT: Back on January 29th.

MR. STEVENS: At noon.

THE COURT: Thank you.

* * * * *

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

All Citations

501 B.R. 491

Footnotes

- 1 References to “Bankr. Doc.” refer to documents filed in the underlying adversary proceeding, *Messer v. GMR, LLC, et al.*, Adv. Pro. No. 12–09072 (Bankr.S.D.N.Y.2012). References to “Doc.” refer to documents filed in the instant appeal.
- 2 The Complaint does not indicate whether there was a prior Note and, if so, what its terms and conditions were.
- 3 Although the loan was to be used by Ricci and Roncati in the development of the Project, neither Ricci nor Roncati are parties to the Note. Rather, GMR is the sole “Borrower” under the Note.
- 4 Roncati is the sole member and owner of 100% of the equity interest in Ariston. Roncati Decl., Ex. C at Recitals C, D.
- 5 In his objection to the motion for default judgment, discussed *infra*, Ricci attached a copy of the Release signed by Mitchell Klein on behalf of FKF. See Reply Mem. L. Mot for Default (Bankr. Doc. 35) ¶ 27.
- 6 [Federal Rule of Civil Procedure 55](#) is made applicable to adversary proceedings through [Federal Rule of Bankruptcy Procedure 7055](#).
- 7 Although it need not reach the issue in light of Appellee's failure to raise it, the Court nevertheless finds that the breach of contract and fraudulent conveyance claims do, in fact, involve “private” rights which the bankruptcy judge may not finally adjudicate absent consent of the parties. See [Adelphia Recovery Trust v. FLP Grp., Inc.](#), No. 11 Civ. 6847(PAC), 2012 WL 264180, at *3–*4 (S.D.N.Y. Jan. 30, 2012) (holding that Supreme Court precedents demonstrate that a fraudulent conveyance claim involves a private right and citing cases holding same); [In re Charter Commc'ns](#), 409 B.R. 649, 655–56 (Bankr.S.D.N.Y.2009) (noting that where an adversary proceeding relates to asserted breaches of a prepetition agreement, that factor weighs against a finding of “core” status).
- 8 [28 U.S.C. § 157\(c\)\(1\)](#) states: “A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under [title 11](#). In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected.”

- 9 The Bankruptcy Court denied Appellants' motion for reargument on the basis that they "failed to meet their burden under Rule 59 and Local Rule 9023–1 of demonstrating an 'intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" Order Denying Motion for Reargument (Bankr. Doc. 54) 2.
- 10 An "administrative default" refers to a default entered by the clerk of the court under [Fed.R.Civ.P. 55\(a\)](#) "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise." [Fed.R.Civ.P. 55\(a\)](#). An administrative default may be set aside for "good cause" shown under [Rule 55\(c\)](#). A default judgment, on the other hand, refers to a final judgment for a certain amount of damages entered against a defendant who has been defaulted for not appearing. [Fed.R.Civ.P. 55\(b\)](#). A court may set aside a default judgment under Rule 60(b) ("Grounds for Relief from a Final Judgment, Order, or Proceeding"). [Fed.R.Civ.P. 55\(c\)](#) ("The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)."). Because this Court has determined to treat the Bankruptcy Court's final judgment as a recommendation, the Court addresses the propriety of vacating the administrative defaults entered against Appellants.
- 11 Rule 7004(b) permits service upon an individual or corporation within the United States by first class mail.
- 12 Although Appellee admits that it agreed to a "reasonable extension," neither party provides the Court with any further detail or explanation of the agreement between the parties, including how long of an extension Appellee agreed to. Moreover, the Court's review of the record indicates that notwithstanding any agreement between the parties, Appellants failed to seek the Bankruptcy Court's approval of an extension of time to respond to the motion to default judgment or otherwise appear in the adversary proceeding until December 26, 2012.
- 13 Appellee's willfulness argument centers mostly on Roncati's actions with respect to another adversary proceeding initiated by the Trustee, *Messer v. John F. Magee, et al (In re FKF 3, LLC)*, Adv. Pro. No. 11–09074 (Bankr.S.D.N.Y. Sept. 12, 2011), in which Roncati was served with third-party discovery requests. See Appellee's Mem. L. Opp. (Doc. 25) 14–17. The Court finds that Roncati's actions with respect to a separate adversary proceeding in which he is not a party is not relevant to the consideration of the willfulness of his default in the present action.
- 14 Indeed, "Note" and "Loan" are defined differently by the Agreement. "Loan" is defined as the loan made by FKF 3 to GMR in the original principal amount of \$1,500,000. "Note," on the other hand, refers to the Amended and Restated Promissory Note dated April 21, 2006, which evidences the Loan. Roncati Decl. (Doc. 18), Ex. D (Release) at Recital A.
- 15 A copy of the transcript is attached hereto as Exhibit A.
- 16 Although the Release appears to impose liability on Ariston for GMR's obligations under the Note, see Roncati Decl. (Doc. 18), Ex. D (Release) ¶¶ 1, 4, in light of Appellee's arguments as to the "validity and application" of the Release, as well as the Court's finding that Appellants have offered a meritorious defense to the fraudulent conveyance claim, the Court finds that the default judgment against Ariston should likewise be vacated.
- 17 The Court notes, however, that Appellee's argument that the Trust suffers prejudice every day the recovery is delayed is substantially weakened by the fact that the adversary proceeding was not instituted for almost 2 years after demand was first made on Roncati and 15 months after the Trustee was first appointed.