

FILED

DEC 01 2014

ASST. CLERK OF COURTS  
REPUBLIC OF MARSHALL ISLANDS

IN THE HIGH COURT  
OF THE  
REPUBLIC OF THE MARSHALL ISLANDS

DONALD PHILLIP and  
OSCILLA PHILLIP,<sup>1</sup>  
Plaintiffs

v.

ACTING ATTORNEY GENERAL  
JACK JORBON,<sup>2</sup>  
AND THE GOVERNMENT OF THE  
REPUBLIC OF THE  
MARSHALL ISLANDS,  
Defendants

CIVIL ACTION NO. 2014-133

**ORDER DENYING  
MOTION TO SET ASIDE  
DEFAULT JUDGMENT**

To: John M. Silk, counsel for plaintiffs  
Rosalie Konou, Assistant Attorney-General

For close to seven years, Oscilla Phillip received quarterly payments for her senior direct interest in Kwajalein Atoll lands under a contract with the Government. In 2013 the Government unilaterally diverted her payments to someone else. Mrs. Phillip and her son, Donald, attempted to resolve this matter with the Government, but were unsuccessful. So they filed this case. The Government's own records show that Oscilla Phillip did not receive over \$227,000 to which she was entitled under the Kawjalein Atoll Trust Fund Act.

The Phillips served a copy of their complaint on the Government. The Government failed to file an answer and was consequently found to be in default. The Phillips then requested the court enter default judgment, and the court set a hearing to determine whether the Phillips were entitled to that relief. The Government appeared at the default judgment hearing but did not move to set aside the default. The court permitted the Government to participate fully at the hearing, and, after hearing the evidence and arguments of counsel, ruled in favor of the Phillips.

<sup>1</sup> Sometime between October 23 and November 5, 2014, Oscilla Phillip passed away. As judgment has entered, there is no need to address MIRCP 25 issues before entering this ruling.

<sup>2</sup> The caption has not been amended to reflect that Nathan Brechtefeld, not Jack Jorbon, is the current Attorney General of the Republic of the Marshall Islands.

and granted default judgment against the Government. The Government now moves to set aside that default judgment.

The only question for the court is whether the Government is entitled to have the default judgment set aside. For the reasons addressed below, the court concludes that it is not.

### **Procedural History Leading up to Entry of Default Judgment**

Donald Phillip and his mother, Oscilla Phillip, filed this case on July 14, 2014. The acting Attorney General was served, on behalf of the Government, on July 15.<sup>3</sup>

The court file reflects that the following occurred on September 24. The court entered an Order Concerning Defendants' Failure to Plead, noting that the defendants had not filed a timely answer.<sup>4</sup> Plaintiffs filed a motion for entry of default and a motion for default judgment. The clerk entered default. The court entered an Interim Order Concerning Motion for Default Judgment, in which it set a hearing for presentation of evidence to support plaintiff's request for default judgment.<sup>5</sup> In addition to setting a hearing for October 23, the court ordered plaintiffs to file a prehearing statement by October 15. The purpose of the statement was to identify witnesses to be called, exhibits to be introduced, and legal argument to be made at the hearing. The Republic, through the Office of the Attorney General, was served with a copy of the interim order.<sup>6</sup>

On October 15 plaintiffs filed a motion for extension of time to file the prehearing statement. The court granted the motion that same day, and the Attorney General was served with a copy of that order on October 16.

On October 17 the Office of the Attorney General filed a prehearing statement. The statement did not list any exhibits or witnesses the Government intended to call at the hearing, and the only law addressed in the motion was MIRCP 19, in support of counsel's belief that the Iroij should be joined in the case. The Government did not, however, move to join a party, and did not address its failure to file a responsive pleading or the entry of default. On October 20

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<sup>3</sup> All dates referenced in this order are in 2014.

<sup>4</sup> The Republic must serve an answer within 60 days after service on the Attorney General. MIRCP 12(a)(2).

<sup>5</sup> MIRCP 55(d).

<sup>6</sup> The Office of the Attorney General was served a copy of the Interim Order on September 24, by email, and on September 25, by personal service.

plaintiffs filed a timely prehearing statement, and, although not required to do so, they served a copy on the Office of the Attorney General.<sup>7</sup>

A hearing on the motion for default judgment was held on October 23. Plaintiffs' counsel appeared with Donald Phillip, who appeared for himself and for his mother, under a power of attorney. Assistant Attorney General Konou appeared for the Government. As the Government did not request the default be set aside before the hearing, and did not request the default be set aside at the beginning of the hearing, the court inquired whether it intended to do so. In response to the court's inquiry, the Government's counsel indicated that she would do so, but did not make a motion on the record, and did not request the hearing be rescheduled so that the court could rule on the motion before proceeding further. Notwithstanding that the Government was in default, the court permitted it to fully participate in the hearing.<sup>8</sup> The court also granted the Government the right to present evidence and make argument that it had not identified in its prehearing statement.

After both sides were given the opportunity to be heard on the motion for default judgment, the court entered a written order on October 27, granting default judgment in favor of the Phillips and against the Government. The Government filed a timely motion to set aside the default judgment.

**The Supreme Court of the Marshall Islands has determined when default judgment may be set aside.**

MIRCP 55(c) provides that the court may set aside entry of default for good cause, and may set aside default judgment under Rule 60(b). MIRCP 60(b) provides relief from a judgment where there is, among other things, "mistake, inadvertence, surprise, or excusable neglect." *Air Marshall Islands, Inc. v. Dornier Luftfahrt*, 2 MILR 211, 218 (2002), quoting from identical

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<sup>7</sup> MIRCP 5(a)(2): "No service is required on a party who is in default for failing to appear."

<sup>8</sup> As MIRCP 55(d) requires the court to take evidence on a request for default judgment against the Republic, the court conducted the hearing under that rule, notwithstanding the Government's anomalous participation.

F.R.C.P. 60(b). The standards in rules 55(c) and 60(b) are very similar and, regardless of any differences, the factors to be considered are the same. *Id.* at 219.<sup>9</sup>

The court has the discretion to deny a Rule 60(b) motion if vacating default judgment would prejudice the plaintiff, if the defendant has no meritorious defense, or if the defendant's culpable conduct led to the default. *Pacific Basin, Inc. v. Mama Store*, 3 MILR 34, 36 (2007), quoting *Hammer v. Drago*, 940 F.2d 524, 525 (9<sup>th</sup> Cir. 1991). As the language in this test is disjunctive, the court may deny relief if only one of these elements exists. *Pacific Basin*, at 36.

What constitutes culpable conduct may depend upon a number of circumstances, but where a defendant has received actual or constructive notice of a lawsuit, "relief under this provision is precluded." *Stanley v. Stanley*, 2 MILR 194, 202 (2002), citing *Hammer, supra* at 525 (a defendant's action is culpable if he has received actual or constructive notice of the filing of the action and failed to answer).

**Under the law of the Republic, the Government has failed to demonstrate that it is entitled to have the default judgment set aside.**

#### *MIRCP 55*

While the analysis applied to determine whether a party is entitled to have default judgment set aside is often factually complex, that is not the case here. It is clear and uncontested that not only did the Government have actual notice that this case had been filed, it was aware that the clerk's default had entered based on its failure to file an answer, and was also aware that the court was going to hold a hearing on plaintiffs request for entry of default judgment.

Although the Government filed a prehearing statement and appeared for the hearing, it never moved to set aside the entry of default before the default judgment hearing, although it had ample opportunity to do so. Although the Government's reasoning confounds the court, the court can only conclude that either it conceded there was no good cause to set aside the default, or it was more than neglectful in failing to request the court do so. Had the court set aside the entry of

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<sup>9</sup> In *AMI v Dornier*, the Supreme Court noted that the U.S. Ninth Circuit has held that the standards under FRCP 55(c) and FRCP 60(b) are "substantially identical," while other circuits have found that the "good cause" standard under FRCP 55(c) is a more lenient standard than "excusable neglect" under FRCP 60(b).

default, the court could not and would not have heard plaintiffs' request for default judgment. But, for reasons known only to counsel for the Government, this avenue was not taken.

The Government's own culpable conduct was therefore the basis for the findings that supported entry of default under MIRCP 55(a), and caused the case to be properly postured for the court to entertain plaintiffs' request for entry of default judgment under MIRCP 55(c) and 55(d).

#### *MIRCP 60(b)*

Even if the Government were not precluded from relief under *Stanley, supra*, the Government's MIRCP 60(b) arguments also fail. The MIRCP 60(b) factors raised by the Government are as follows.

- MIRCP 60(b)(1): Mistake, inadvertence, surprise, or excusable neglect.

The Government does not argue mistake, inadvertence or surprise, and the court has shown, above, why "excusable neglect" is not available to the Government.

Thus, the Government's argument fails under MIRCP 60(b)(1).

- MIRCP 60(b)(2): Newly discovered evidence that, with reasonable diligence, could not have been discovered [in time to move for a new trial under Rule 59(b)].

As plaintiffs point out, this factor is not satisfied by alleging that there is a possibility that another case<sup>10</sup> may turn out in such a way as to "become[ ] newly discovered evidence." MIRCP 60(b)(2) is premised on evidence that exists *at the time the motion is made*. Not only does the Government fail because it does not allege any newly discovered evidence, it only speculates that such evidence may come into being at some future time. This argument fails in light of the plain language, and purpose, of the rule.

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<sup>10</sup> The other case is CA 2014-150, Donald Phillip v. Republic of the Marshall Islands. The cases have not been consolidated, nor has either party requested they be consolidated. The court has denied the Government's motion for joinder, and an answer has been filed.

- MIRCP 60(b)(4): The judgment is void.

The Government makes the same argument under 60(b)(4) as it does under 60(b)(2): that resolution of CA 2014-150<sup>11</sup> will favor the Government, which, in turn, will render this judgment void. The court cannot respond to this contention any better than did plaintiffs: “Defendants’ unfounded speculation regarding [CA] 2014-150 does not in any way render the judgment entered in this case void.” The Government has provided no authority for its argument under MIRCP 60(b)(4), and the court is aware of none.

**The Government is not entitled to have the default judgment set aside.**

The court agrees with the Government’s statement that “[i]t was very unfortunate for this matter to be defaulted.” (Reply, p.1) Trial on the merits is favored over default judgment, and default judgments are generally disfavored. *Stanley*, at 199. The court also agrees with the substance of the Government’s next statement, that “[t]he default judgment in this matter is gained by plaintiffs procedurally *due to inactive position of the other side in providing an Answer timely and pursuant to procedural rules . . .*” (emphasis added)(Reply, p.1).

Notwithstanding the court’s preference for a trial on the merits, the rules of civil procedure still apply, and the Government has simply not followed them. *See, Pacific Basin, Inc. v Mama Store*, 3 MILR 34, 38 (2007) (“Counsel has cited no authority, and we have found none, for the proposition that garden variety malpractice by an attorney is a valid reason to require a court to [set] aside its judgment entered after notice to appear, and a default thereof, in the absence of some showing of manifest injustice, overreaching or negligence by the court or by its officers and assistants.”)

The court gave the Government the opportunity to be heard on the merits at the hearing. Not only did the court permit the Government to participate fully, but the court recessed the hearing at least once so that the Government might obtain a document that was then offered and admitted into evidence. After reviewing the evidence and arguments of counsel, the court

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<sup>11</sup> See note 6, above.

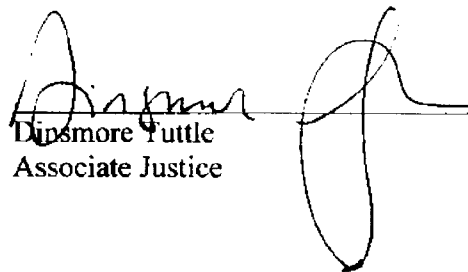
concluded that the Government failed to present evidence sufficient to overcome the evidence that established plaintiffs' right to relief to the satisfaction of the court.<sup>12</sup>

In addition to rearguing the position it offered at the hearing, the Government focuses on arguments it has raised, in a procedurally timely manner, or intends to raise in CA 2014-150. However, the Government cites no authority for the proposition that facts and circumstances concerning a different case excuse its conduct in this case. And the court is aware of none.

**The motion to set aside default is denied.**

Plaintiffs were, and remain, entitled to default judgment against the Government.

Dated: 01 December 2014

  
Dinsmore Tuttle  
Associate Justice

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<sup>12</sup> MIRCP 55(d).

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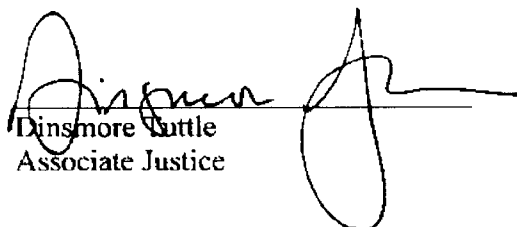
**JUDGMENT**

To: John M. Silk, counsel for plaintiffs  
Rosalie Konou, Assistant Attorney-General

Upon review of plaintiffs' statement concerning the amount withheld from Oscilla Phillip by the Government, awarded in this court's default judgment, and the Government having waived its right to oppose this finding by failing to comply with this court's order entered October 27, 2014, judgment enters in favor of plaintiffs in the amount of \$227,889.19 plus prejudgment interest at 0.5% per month in the amount of \$5,432.00. Interest shall accrue at the rate of 6% until judgment is paid or otherwise satisfied.

SO ORDERED.

Dated: 01 December 2014

  
Dinsmore Tuttle  
Associate Justice