IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JEMAL AHMED,	:	
	:	
Plaintiff,	:	
	:	**CIVIL ACTION NO.**
v.	:	**1:12-CV-2697-SCJ**
	:	
ETHIOPIAN REVIEW, INC.	:	
	:	
Defendant.	:	

ORDER

Nearly four and a half five years after this suit was filed, Defendant Ethiopian Review, Inc. ("Ethiopian Review") filed the present motion to vacate the default judgment against it. Doc. No. [185]. This was about two years after the initial default judgment against Ethiopian Review (Doc. No. [93]) and over a year and a half after defense counsel made their entries of appearance. See Docs. No. [130], [131], [132], [133].[1] Ethiopian Review offers three bases for setting aside the default judgment: (1) the judgment is "void"; (2) Ethiopian Review can show "mistake, inadvertence, surprise, or excusable neglect"; and (3) vacating the default judgment is justified by "other reason[s]." The Court addresses each of these arguments in turn.

[1] While defense counsel have only formally appeared on behalf of former-defendant Elias Kifle, they have sworn to the Court that they intended to make entries of appearance on behalf of Ethiopian Review by June 26, 2015, at the absolute latest. Docs. No. [191], [192], [193], [194].

I. ANALYSIS

A. Rule 60(b)(4)

Ethiopian Review first asserts that the Court lacks personal jurisdiction over it, rendering the default judgment "void," pursuant to Fed. R. Civ. P. 60(b)(4). Doc. No. [185-1], pp. 11–18. "It is well-settled that lack of personal jurisdiction is a waivable defect, and that a defendant waives any objection to the district court's jurisdiction over his person by not objecting to it in a responsive pleading or a Fed.R.Civ.P. 12 motion." Palmer v. Braun, 376 F.3d 1254, 1259 (11th Cir. 2004). Ethiopian Review is correct that it was"entitled to ignore the complaint, suffer a technical default judgment, and collaterally attack the judgment for lack of jurisdiction." Doc. No. [189], p. 10. This is precisely what it did in its Rule 12 motion to dismiss filed in June 2015. See Doc. No. [139]. What Ethiopian Review is not "entitled" to do is litigate jurisdiction piecemeal. If Ethiopian Review believed it had a meritorious personal-jurisdiction argument, it should have been raised in the first Rule 12 motion to dismiss. The failure to raise the argument then, and decision to

wait more than a year and a half to raise it,[2] results in waiver. See Doc. No. [185]; see also Palmer, 376 F.3d at 1259.

Ethiopian Review contends that its prior Rule 12 motion does not "remotely suggest that [it] consented to jurisdiction." Doc. No. [189], p. 12. But this argument misses the boat. Generally, a party gets only one bite at the Rule-12(b)-defense apple. Fed. R. Civ. P. 12(g)(2)(a party who files a Rule 12 motion "must not make another motion under [Rule 12] raising a defense or objection that was available to the party but omitted from its earlier motion"). The only exceptions are for the defenses of lack of subject-matter jurisdiction, failure to state a claim, and failure "to join a person required by Rule 19(b)." Fed. R. Civ. P. 12(h)(2), (3). There is no exception for a failure to raise a personal-jurisdiction defense. Thus, this defense was waived and cannot form the basis of Ethiopian Review's motion to vacate the default judgment as "void." See Fed. R. Civ. P. 12(h)(1)(A); Palmer, 376 F.3d at 1259.

[2] Notably, the Motion to Dismiss was not the only document filed by Ethiopian Review in the year and a half before it raised the issue of personal jurisdiction. In its reply in support of the Motion to Dismiss, Ethiopian Review argued that if former-defendant Kifle were dismissed, the Court would lack *subject-matter* jurisdiction over Ethiopian Review. Doc. No. [148], pp. 15–16. In its response to the Motion to Sever former-defendant Kifle, Ethiopian Review extensively argued Kifle was indispensable. Doc. No. [158]. Nowhere did it ever suggest personal jurisdiction may be lacking.

B. Rule 60(b)(1)

With regard to Ethiopian Review's other two grounds for vacating the default judgment—Rule 60(b)(1), (6)—the parties dispute whether the motion is timely. See Doc. No. [186], pp. 10–12; Doc. No. [189], pp. 6–9. Ethiopian Review is correct that the initial default judgment was void, and thus the proper time-frame for deciding if it acted "within a reasonable time" is from the date the judgment was reinstated in October 2016. See Doc. No. [189], p. 7. But while the motion may not be time-barred by Fed. R. Civ. P. 12(c)(1), the "longer a defendant . . . delays in responding to a complaint, the more compelling the reason it must provide for its inaction when it seeks to set aside a default judgment." Sloss Indus. Corp. v. Eurisol, 488 F.3d 922, 935 (11th Cir. 2007).

Ethiopian Review argues that the Court should vacate the default judgment pursuant to Rule 60(b)(1), which covers situations of "mistake, inadvertence, surprise, or excusable neglect." Doc. No. [185-1], pp. 18–24. "In order to establish mistake, inadvertence, or excusable neglect, the defaulting party must show that: (1) it had a meritorious defense that might have affected the outcome; (2) granting the motion would not result in prejudice to the non-defaulting party; and (3) a good reason existed for failing to reply to the complaint." Florida Physician's Ins. Co. v. Ehlers, 8

F.3d 780, 783 (11th Cir. 1993). A "meritorious defense" means the party "must make an affirmative showing of a defense that is likely to be successful." In re Worldwide Web Sys., Inc., 328 F.3d 1291, 1296 (11th Cir. 2003). Ethiopian Review offers two allegedly meritorious defenses: (1) that it was not responsible for the publishing of the defamatory article that is the subject of the complaint, and (2) that the article was not defamatory.

Ethiopian Review admits that the Court has already rejected its argument that it has no control over the www.EthiopianReview.com website, where the article at issue was published. See Doc. No. [185-1], p. 15–18; see also Doc. No. [178], pp. 7–10. The principle piece of evidence relied on by the Court was the fact that *the website itself* says donations to support the website should be sent to Defendant Ethiopian Review, Inc. Doc. No. [178], pp. 7–9; see also Doc. No. [147-1]. The Court noted that Ethiopian Review had not "addressed the direct evidence that funds sent to Defendant Ethiopian Review were used to support media operations, pay for web services, and fight libel lawsuits" for www.EthiopianReview.com. Doc. No. [178], p. 8.

Defendant has finally addressed the evidence, but only to complain that it "entered the record as an exhibit to Plaintiff's opposition to Defendants' motion to

stay." See Doc. No. [185-1], p. 16. It, thus, argues the evidence "needed no rebuttal" and that to consider the evidence "would deprive Ethiopian Review, Inc. of notice and an opportunity to be herd, violating the Due Process Clause." Doc. No. [185-1], p. 17. Ethiopian Review has been on "notice" that the Court considered this evidence fatal to its argument since at least the order on the Motion to Sever. Doc. No. [179]. Nevertheless, Ethiopian Review fails to discuss the merits and obvious import of this evidence. See Doc. No. [185-1], pp. 15–18.

The Court has already considered, and rejected, former-defendant Elias Kifle's self-serving affidavit asserting that Ethiopian Review "lacks authority or control over" the website. See Doc. No. [178], pp. 7–10. In particular, the Court noted that no bank records supported Kifle's contentions about how Ethiopian Review funds were used. Id. p. 10. Ethiopian Review states that its "[d]ifficulties" with obtaining bank records "stymied" its ability to file the present Motion to Vacate sooner. Doc. No. [179], pp. 8–9. But as of the date of this order, nearly nine months since the issue was brought to Ethiopian Review's attention, no bank records have been submitted supporting Kifle's assertions. Additionally, as the Court previously noted, Kifle's failure "to maintain every corporate formality in operating Ethiopian Review" does not insulate it from liability. Doc. No. [178], p. 10. Thus, the Court holds Ethiopian

Review has not made "an affirmative showing" that it "is likely to be successful" in its argument it was not responsible for the website and its content. See In re Worldwide Web Sys., Inc., 328 F.3d at 1296.

Ethiopian Review's second allegedly meritorious defense is that the article on its website was not defamatory because it was true. In support of this argument, it notes that Plaintiff "leads several large corporations in a country where human rights abuses are rampant." Doc. No. [189], p. 17. But simply because Plaintiff is a businessman in a country where human rights abuses occur does not mean that Ethiopian Review can baselessly accuse him of those abuses. Ethiopian Review does cite to two articles that are specifically about Saudi Star, a company Plaintiff is allegedly involved with.[3] The first article discusses the forced displacement of people in the Gambella region of Ethiopia so Saudi Star can grow rice, maize, teff, sugarcane, and oilseed. Doc. No. [144-6]. The second discusses abuses of local villagers by Ethiopian soldiers after Saudi Star's compound was attacked by armed gunmen. Doc.

[3] Ethiopian Review characterizes Saudi Star as "one of [Plaintiff's] companies." Doc. No. [189], p. 17. However, Saudi Star appears to be owned by Mohammed al–Amoudi, and neither article about the company mentions Plaintiff. See Doc. No. [11], pp. 33–37; Doc. No. [144-6]. Plaintiff is the general manager of another company owned by al–Amoudi, Horizon Plantations Ethiopia, but the Court has seen no evidence that Plaintiff is involved in the operation of Saudi Star. See Doc. No. [11], p. 38. Notably, even the article that is the subject of this lawsuit states that Plaintiff is in charge of Horizon Plantations and does not mention Saudi Star. Doc. No. [1-3], pp. 2–3.

No. [11], pp. 33–37. If the article on Ethiopian Review's website had been about either of these occurrences, then this evidence would have supported Defendant's argument that the article was true. But it had absolutely nothing to do with either event.

The article at issue accuses Plaintiff of "selling [Ethiopian] women as slaves to Arab countries." Doc. No. [1-3], pp. 2–3. It is this article, accusing him of trafficking some 45,000 women a month, that he asserts is defamatory, not an article about Saudi Star's land acquisitions and alleged abuses. Id. Notably, Saudi Star's actions did not even occur in the same regional state—or *kilil*—from which the women were allegedly being taken. Compare Doc. No. [144-6], with Doc. No. [1-3], pp. 2–3. Thus, Ethiopian Review has presented some evidence that (a) human rights abuses occur in Ethiopia, and (b) Plaintiff is allegedly involved with a company that allegedly committed human rights abuses in the Gambella region of Ethiopia. It argues that this proves Plaintiff was trafficking women from totally separate regions of Ethiopia. It does no such thing.

Ethiopian Review complains that it is not "feasible to simultaneously prove the article's content" and contest jurisdiction. Doc. No. [189], p. 18. But the Court cannot overrule the Eleventh Circuit precedent requiring Ethiopian Review to "make an affirmative showing of a defense that is likely to be successful" simply because

Ethiopian Review finds this burden onerous. In re Worldwide Web Sys., Inc., 328 F.3d at 1296. Ethiopian Review further argues that it cannot "prove its case without jeopardizing the safety of the article's sources." Doc. No. [189], p. 18. But this argument is old hat. A protective order was "entered to ensure the confidentiality of any information" provided in discovery. Doc. No. [178], p. 13 n.1. If Ethiopian Review believed these measures were inadequate it could have, for example, asked to submit evidence for *in camera* inspection. It has not done so. In short, Ethiopian Review has not made the required "affirmative showing of a defense that is likely to be successful." See In re Worldwide Web Sys., Inc., 328 F.3d at 1296.

Granting Defendant's motion would also result in tremendous prejudice to Plaintiff. Ethiopian Review makes the rather extraordinary claim that Plaintiff "has only himself to blame" for the delays in this case. Doc. No. [189], p. 18. While Plaintiff erroneously added former-defendant Kifle as a party, he is not responsible for the fact that Ethiopian Review chose not to participate in this litigation for nearly three years. Nor is he responsible for Ethiopian Review's failure to raise its personal-jurisdiction argument in its initial Rule 12 motion. Plaintiff has been an active and dutiful participant in this litigation for going on five years. He did not cause Ethiopian Review to show up late to the game, and he would suffer grievous prejudice by being

forced to start over because Ethiopian Review finally wants to be herd on the merits. The potential prejudice to Plaintiff is of "primary importance" and alone is a sufficient basis for denying the motion to vacate. Cheney v. Anchor Glass Container Corp., 71 F.3d 848, 850 (11th Cir. 1996).

While not mentioned by the parties, "the interest of efficient judicial administration" is also of "primary importance." Id. The nearly two hundred docket entries in this case tell a tale of resources that would be wasted if this case were to simply start from scratch as Ethiopian Review suggests. Three district court judges, a magistrate judge, and the Eleventh Circuit have put hundreds of man-hours into the handling of this case. Ethiopian Review argues that it "had the right to ignore" all of these proceedings. See Doc. No. [185-1], p. 22. This is true. But a decision "to ignore the judicial proceedings" comes with an attendant "risk." See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492 (1982).

If the defendant's challenge to the "judgment on jurisdictional grounds" fails, as Ethiopian Review's does here, then the decision to ignore the proceedings for years is an ill-advised one. See id.; see also Eurisol, 488 F.3d at 934 (defendant, whose personal-jurisdiction argument failed, "did not show a good reason for failing to

respond to [the] complaint"). Actions have consequences. Ethiopian Review's arguments are too little, too late and the Court will not vacate the judgment on the grounds of "mistake, inadvertence, surprise, or excusable neglect." See Fed. R. Civ. P. 60(b)(1); see also Ehlers, 8 F.3d at 783.[4]

C. Rule 60(b)(6)

Finally, Ethiopian Review argues that the Court should vacate the default judgment pursuant to Rule 60(b)(6) for "other reason[s] that justif[y] relief." Doc. No. [185-1], pp. 24–28. It offers three reasons: (1) the compensatory damages were based on "unreliable expert testimony," (2) Ethiopian Review is not liable for Kifle's misconduct during the litigation, and (3) other "equitable considerations." Id. p. 24. Ethiopian Review's first argument is, again, made far too late. If Ethiopian Review believed Plaintiff's expert was deficient, it should have challenged the expert at the damages hearing. But Ethiopian Review did not appear at the hearing. Moreover, Ethiopian Review does not challenge the qualifications of Plaintiff's expert or dispute that he explained how he calculated the damages figure he provided. See id. pp. 24–26. Rather, Ethiopian Review argues that the expert should have provided

[4] Because the Court holds that Ethiopian Review cannot make a showing as to the first two criteria for excusable neglect, the Court need not reach the question of whether Ethiopian Review could make a showing as to the third. See Ehlers, 8 F.3d at 783 (mandating that all three requirements be met).

more information as to "why" the exact figures he used were appropriate. Id. One can always ask "why," demanding more and more details to support an explanation. But Ethiopian Review does not come forward with an expert of its own or any other evidence to suggest that Plaintiff's expert's opinion was incorrect in any respect. See id.

Ethiopian Review's second argument stands on much surer footing. The Court has already acknowledged that "Ethiopian Review is not liable for . . . Kifle's misconduct during the litigation." Doc. No. [178], p. 11. But Plaintiff suggests that, because Kifle was an officer of Ethiopian Review, the company "may be held liable for his acts." Doc. No. [186], p. 26 n.4. Both sides are right to some extent. During the litigation, Kifle was acting on his own behalf and the mere fact that he was an officer of Ethiopian Review does not make it liable for his conduct. Kifle did not, and indeed legally could not, act on behalf of Ethiopian Review during the litigation. See Palazzo v. Gulf Oil Corp., 764 F.2d 1381, 1385–86 (11th Cir. 1985) (*pro se* officer of company cannot act on the company's behalf because a corporation "cannot appear *pro se*, and must be represented by counsel"). But Ethiopian Review can be held liable for the actions of its agent with respect to the defamatory article on its website *before* the initiation of this suit.

In deciding the issue of punitive damages, the Court noted that "*Defendants* did nothing to remove the defamatory article" before the suit, despite being advised by Plaintiff that the allegations in the article were false. Doc. No. [92], pp. 7–8 (emphasis added). Instead of even purporting to offer any evidence that the article was true, Kifle posted on Ethiopian Review's website asking Plaintiff where he was "going to sue" and telling him to "[b]ring it on please." Doc. No. [1], p. 9 ¶35. It was this fact, as opposed to any post-litigation conduct, that the Court found "amount[ed] to clear and convincing evidence of willful misconduct." Doc. No. [92], p. 8. Just as Ethiopian Review cannot escape liability for the content on its website by blaming its officer, neither can it avoid liability for his pre-litigation conduct with respect to the defamatory article. But because the punitive damages award was based, in part, on Kifle's "disregard[ ]" for Court orders, the Court concludes that the punitive damages should be reduced by half.

Ethiopian Review's argument with regard to attorneys' fees is likewise partially successful. The decision to award attorneys' fees pursuant to O.C.G.A. § 13-6-11 focuses exclusively on pre-litigation conduct. David G. Brown. P.E.. L:rc. v. Kent., 274 Ga. 849,850, 561 S.E.2d 89,90-97 (2002). For the reasons discussed above, Plaintiff demonstrated ample evidence that Ethiopian Review's pre-litigation conduct

was stubbornly litigious, justifying an award under § 13-6-11. See Water's Edge Plantation Homeowner's Ass'n, Inc. v. Reliford, 315 Ga. App. 618, 620, 727 S.E.2d 234, 237 (2012) (noting that "if a default judgment is subsequently entered against the defendant for failing to answer the complaint, then the plaintiff is entitled to an award of attorney fees and expenses as a matter of law from the defendant having caused unnecessary trouble and expense"). But the *amount* of that award cannot be based on expenses incurred as a result of Kifle's conduct during the litigation. Ethiopian Review is not liable for that conduct. While the award of attorneys' fees must be reduced, at present the Court has no basis for determining which hours Plaintiff's attorneys spent working on this case due solely to Ethiopian Review's conduct.

Ethiopian Review also argues that other "equitable considerations" weigh in favor of vacating the entire default judgment. Doc. No. [185-1], pp. 27–28. Of course, "default judgments are generally disfavored." Surtain v. Hamlin Terrace Found., 789 F.3d 1239, 1245 (11th Cir. 2015). But Ethiopian Review's failure to obtain proper representation, properly raise arguments, and present corroborating evidence for its arguments is not simply a "technical error or . . . slight mistake." See Ehlers, 8 F.3d at 783. Ethiopian Review cites Palazzo to argue that the default judgment should be set aside because it lacked representation. See Doc. No. [185-1], p. 27 n.82. But in

Palazzo, the Eleventh Circuit affirmed the dismissal of corporate claims *because of* the lack of representation and the fact that the plaintiff was "fully advised of the need for proper representation." 764 F.2d at 1386. Far from suggesting Ethiopian Review's default was excusable, Palazzo suggests that it is inexcusable to ignore this most basic procedural tenet.

Ethiopian Review also argues that the judgment should be vacated because of First Amendment concerns. Doc. No. [185-1], p. 27. But while "libel can claim no talismanic immunity from constitutional limitations," the Supreme Court "has never . . . held that liberty of speech is absolute." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269, 84 S. Ct. 710, 720, 11 L. Ed. 2d 686 (1964); Times Film Corp. v. City of Chicago, 365 U.S. 43, 47, 81 S. Ct. 391, 393, 5 L. Ed. 2d 403 (1961). Under the circumstances, holding Defendant liable for defamation does not offend the First Amendment. Moreover, Ethiopian Review's suggestion that Plaintiff "has been accused of human trafficking" is grossly misleading. See Doc. No. [185-1], pp. 27–28. As noted above, the record before the Court demonstrates that Defendant is the *only* one to have ever accused Plaintiff of human trafficking. Defendant's citation to evidence that other people in Ethiopia have committed human rights abuses does not give it free-rein to lodge unsubstantiated charges against Plaintiff. See Doc. No. [185-1], p. 28; see also Doc. No. [144-1], pp. 6–8. That is the entire point of this suit.

Relief from judgment under Rule 60(b)(6) is "an extraordinary remedy," which consequently requires a showing of "extraordinary circumstances" justifying the relief. Arthur v. Thomas, 739 F.3d 611, 628 (11th Cir. 2014). Ethiopian Review's belated challenge to the level of detail provided by Plaintiff's expert is not enough. Nor is the mere fact that this case involves freedom-of-speech concerns. Ethiopian Review has not come forward with any evidence demonstrating that the actual allegations in the article at issue are true, and cannot hide its defamation behind the First Amendment. But Ethiopian Review is correct that it should not be held liable for the actions of Kifle during this litigation.

II. CONCLUSION

Defendant's Motion to Vacate the default judgment (Doc. No. [185]) is **DENIED** to the extent that it requests the Court vacate the entire default judgment. However, it is **GRANTED** to the extent that it requests the Court amend the amount of the judgment. Within **seven days** of this order, Plaintiff is **ORDERED** to file an affidavit documenting his attorneys' fees incurred solely as a result of Ethiopian Review's conduct. Defendant will have **seven days** in which to file a response, if it

so chooses. The Court will then determine the amount of reasonable attorneys' fees and enter a new judgment.

IT IS SO ORDERED, this 7th day of July, 2017.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE