

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	:	
THE IT GROUP, INC., <i>et al.</i> ,	:	
	:	Case No. 00-10018 (MFW)
	:	(Jointly Administered)
Debtors,	:	
	:	
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF THE IT GROUP, <i>et al.</i> ,	:	
On behalf of The Estate of The IT Group, Inc., <i>et al.</i> ,	:	
	:	Adv. Proc. No. 04-50690 (PBL)
Plaintiffs,	:	
	:	
v.	:	Related Documents: 15, 16, 18, 19
	:	
K-PRIME, INC.,	:	
	:	
Defendant.	:	
	:	

**MEMORANDUM AND ORDER GRANTING IN PART, AND DENYING IN PART,
MOTION OF DEFENDANT FOR AN ORDER (I) SETTING ASIDE DEFAULT
AND DEFAULT JUDGMENT, (II) DISMISSING COMPLAINT,
AND (III) FOR ATTORNEYS' FEES AND COSTS**¹

Before the Court is K-Prime, Inc.'s Motion for an Order (I) Setting Aside Default and Default Judgment, (II) Dismissing the Complaint, and (III) Granting Attorneys' Fees and Costs.

¹ This Memorandum shall constitute the findings of fact and conclusions of law of the Court pursuant to Rule 7052, Federal Rules of Bankruptcy Procedure.

For the reasons stated below, the Motion will be granted in part, and denied in part.

Background

On January 16, 2002 (the “petition date”), Debtors each filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.² On January 10, 2004, Plaintiff, on behalf of Debtors, filed the complaint in this case, seeking to avoid and recover certain allegedly preferential transfers made to Defendant during the 90 days prior to the petition date, pursuant to §§ 547 and 550. On May 4, 2004, Plaintiff mailed its summons, a copy of the complaint and a motion seeking to extend time for service of summons and complaint. According to Plaintiff’s Certificate of Service, dated May 20, 2004 and filed June 3, 2004 [D.I. 5], those items were addressed to “President - 3621 Westwind Blvd. - Santa Rosa, CA 95403.”

On October 7, 2004, Plaintiff filed its Applications for Entry of Default and for Default Judgment dated October 1, 2004 [D.I. 11 and 12]. According to the Certificate of Service attached to the application, they were mailed, addressed to Defendant at the above address on October 6, 2004. The applications were granted on October 14, 2004 [D.I. 14].

Defendant contends that it did not recall receiving a copy of the summons and complaint, and immediately upon receipt of the Applications for Default and for Default Judgment, its counsel contacted Plaintiff’s counsel requesting a copy of the same and an agreement to an extension of time to answer the complaint. Upon learning of the granting of the applications, counsel requested that the judgment be set aside, to no avail. According to Defendant, Plaintiff

² 11 U.S.C. §§ 101 et seq. References hereafter to statutory provisions by section number only will be to provisions of the Bankruptcy Code unless the contrary is clearly indicated.

was at that point only interested in obtaining a settlement from Defendant.

Jurisdiction

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§1334 and 157(b)(1). This is a core proceeding under 28 U.S.C. §157(b)(2)(A), (F), and (O).

Standard of Review

Under Rule 55(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7055 of the Federal Rules of Bankruptcy Procedure, the Court may for good cause shown set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b), F.R.Civ.P. Rule 60 is made applicable to this proceeding by Rule 9024, F.R.Bankr.P.

Under Rule 60(b), the Court may relieve a party from a final judgment for, *inter alia*, mistake, inadvertence, surprise, or excusable neglect, because the judgment is void, or for any other reason justifying relief from the operation of the judgment.

Discussion and Decision

In this case, Defendant asserts that while its office is located at the address to which the summons and complaint were mailed, that location is a building housing several other entities. While each of those entities have separate street addresses, Defendant asserts that it is not at all uncommon for mail to be misdelivered within the building, and that it has no recollection of having received the summons and complaint. In view of the fact, confirmed by Plaintiff's

Certificate of Service, that the name of Defendant did not appear on the summons, but that it was directed only to "President" at Defendant's street address, Defendant's assertions are certainly not inherently incredible.

Plaintiff has filed with its opposition to Defendant's motion the declaration of Adam Sanderson, an associate at AlixPartners, LLC, the Trustee of the IT Litigation Trust. Mr. Sanderson asserts that every mailing label generated for service of the over 1,200 adversary proceedings included the name of the defendant, attention to the President, the street address, city, state and zip code. He further asserts, rather remarkably in this Court's view, that the reason the Certificate of Service did not include the name of the Defendant in the "addressed to" block was because the name of the defendant was already noted on the same page in the caption of the adversary proceeding. Plaintiff has filed an Amended Certificate of Service dated January 6, 2005, certifying that service was made on May 4, 2004 by first class mail, and that the service was addressed to Defendant, along with "President" and the street address, city and state.

This Court is compelled to note that a significant number of Defendants in adversary proceedings brought by this Plaintiff have asserted, as does Defendant in this case, that service was not received by them, and that Plaintiff's Certificate of Service did not contain the Defendant's name, but was directed only to "President." These assertions have been made in connection with motions by Defendant to vacate the entry of default and default judgment and in connection with Defendant's opposition to Plaintiff's motion for entry of default and default judgment.

In the circumstances, it is the opinion of this Court that there is more than ample justification to vacate the entry of default and the default judgment in this case, and to permit

Defendant to answer or otherwise plead in response to the complaint. Even if it had been established that the summons and complaint were in fact received by Defendant, which is by no means clear, the Court would exercise its discretion and find that either mistake, inadvertence or excusable neglect was responsible for the failure to timely respond.

This Court, however, declines to dismiss the complaint as requested by Defendant. While Defendant has called into question the validity of service and the *in personam* jurisdiction of the Court, Defendant's assertions are controverted by Plaintiff, and have not been established to a sufficient degree to justify the dismissal of the complaint. Dismissal, even if without prejudice, would preclude Plaintiff proceeding against Defendant under § 547, given the fact that the two-year statute of limitations of § 546(a)(1)(A) has long since expired. Defendant may attack the jurisdiction of the Court through a motion to dismiss if it chooses to do so.

Further, this Court does not believe it is either necessary or appropriate that Defendant be awarded its attorneys' fees and costs for initiating and prosecuting its motion herein.

NOW THEREFORE, it is the **ORDER** of this Court that:

Defendant's motion, insofar as the same sought an order setting aside the entry of default and the default judgment herein, be, and it is hereby, **GRANTED**;

The entry of default entered herein be, and it is hereby, set aside and held for naught;

The default judgment entered herein in favor of Plaintiff and against Defendant be, and it is hereby, **VACATED** and held for naught;

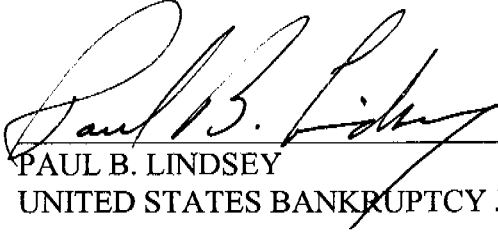
Defendant's motion, insofar as the same sought the entry of an order dismissing the complaint with prejudice, be, and the same is hereby, **DENIED**;

Defendant's motion, insofar as the same sought an order granting Defendant its attorneys'

fees and costs, be, and the same is hereby, **DENIED**; and,

Defendant shall have 20 days from the entry of this Order to answer, move, or otherwise respond to the Complaint.

Dated: January 25, 2005
Wilmington, DE



PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE