

S E R V E D
May 24, 2016
FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 15-11

IGOR OVCHINNIKOV, IRINA RZAEVA, and DENIS NEKIPELOV

v.

**MICHAEL HITRINOV a/k/a MICHAEL KHITRINOV,
EMPIRE UNITED LINES CO., INC., and CARCONT, LTD.**

**ORDER DISCHARGING ORDER TO SHOW CAUSE AND
DENYING MOTION FOR INITIAL DECISION ON DEFAULT**

BACKGROUND

On November 12, 2015, complainants Igor Ovchinnikov, Irina Rzaeva, and Denis Nekipelov commenced this proceeding by filing a Verified Complaint with the Secretary. Respondent Empire United Lines Co., Inc. (Empire) is licensed by the Commission as a non-vessel-operating common carrier (NVOCC). Respondent Michael Hitrinov a/k/a Michael Khitrinov (Hitrinov) is Empire's sole principal and officer. *Baltic Auto Shipping, Inc. v. Michael Hitrinov a/k/a Michael Khitrinov and Empire United Lines Co., Inc.*, FMC No. 14-16 (Sept. 15, 2015) (Initial Decision on Respondents' Motion for Partial Summary Decision), exceptions filed, Jan. 15, 2016. The Complaint alleges that Hitrinov owns CarCont, Ltd. (CarCont), a company located in Kotka, Finland, and is "the Chairperson of the Board of CarCont, with signatory authority and direct control over respondent CarCont." (Complaint ¶¶ II.9-11.)

The Complaint alleges that Respondents violated 46 U.S.C. §§ 40301, 40302, 40501, 40701, 41102, 41104, and 41106 of the Shipping Act and Federal Maritime Commission (FMC or Commission) regulations at 46 C.F.R. Part 515, and that Complainants each suffered direct damages: Ovchinnikov in excess of \$28,960.00, Rzaeva in excess of \$32,101.00, and Nekipelov in excess of \$19,920.00. Complainants further allege that the full extent of their damages can only be determined

after discovery has been conducted and interest due to them and the cost of their legal fees calculated. (Complaint at 15-16.)

As set out more fully in the Notice of Default, the Secretary sent the Complaint and Notice of Filing to Respondents by UPS, but the packages were returned with the notation that the receivers refused delivery. Complainants also engaged a special process server to serve the Complaints. Respondents did not answer or otherwise respond to the Complaint. On February 14, 2016, Complainants filed a motion for initial decision on default against respondents Hitrinov and Empire. On March 30, 2016, the undersigned issued a Notice of Default and Order to Show Cause requiring Hitrinov and Empire to answer or otherwise respond to the Complaint and to show cause why an initial decision on default should not be entered against them. *Igor Ovchinnikov, Irina Rzaeva, and Denis Nekipelov v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc., and CarCont, Ltd.*, FMC No. 15-11 (ALJ Mar. 30, 2016) (Notice of Default and Order to Show Cause). On April 7, 2016, Empire and Hitrinov filed a motion seeking additional time in which to respond. They stated that they had only recently retained counsel and asked for a date “21 days after Respondents’ forthcoming motion to stay these proceedings pending determination of first-filed federal court litigation seeking damages for the same actions regarding the very same cars.” (Respondents’ Motion for Additional Time in Which to Respond at 1-2.) The motion was granted in part and denied in part. The time for Hitrinov and Empire to file an answer or answers was enlarged to May 2, 2016. Hitrinov and Empire were also ordered to include any defenses identified in Federal Rule of Civil Procedure 12(b) in an answer, not solely in a motion asserting those defenses. *Igor Ovchinnikov, Irina Rzaeva, and Denis Nekipelov v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc., and CarCont, Ltd.*, FMC No. 15-11 (ALJ Apr. 13, 2016) (Order Granting in Part and Denying in Part Motion for Additional Time in Which to Respond).

On April 14, 2016, Empire and Hitrinov filed a motion to stay this proceeding pending resolution of an action pending in the United States District Court for the District of New Jersey. The motion was denied on April 27, 2016. *Igor Ovchinnikov, Irina Rzaeva, and Denis Nekipelov v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc., and CarCont, Ltd.*, FMC No. 15-11 (ALJ Apr. 27, 2016) (Order Denying Respondents’ Motion for Stay).

On May 4, 2016, Hitrinov and Empire filed their Answer to the Complaint setting forth defenses to the action and articulating affirmative defenses¹ and their response to the order to show cause. In their response to the order to show cause, they articulate four reasons that a decision on default should not be entered:

¹ Respondents failed to verify the Answer and were ordered to file a verified Answer. *Igor Ovchinnikov, Irina Rzaeva, and Denis Nekipelov v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc., and CarCont, Ltd.*, FMC No. 15-11 (ALJ May 19, 2016) (Order Enlarging Time to File Documents and Requiring Filing of a Verified Answer). They filed the verified Answer on May 23, 2016.

(1) Such a judgment would be inconsistent with precedent declaring default to be a drastic remedy of last resort that should be used only when the matter cannot be litigated on the merits; (2) The Commission lacks personal jurisdiction over Respondents; (3) The Complaint fails to state a claim upon which relief could be granted; and (4) The Commission lacks subject matter over the dispute.

(Response of Respondents to Order to Show Cause at 1.) In their argument on their second ground, Hitrinov and Empire rely on a number of cases construing sufficiency of service of process under Federal Rule of Civil Procedure 4 and contend that even if Hitrinov and Empire had notice of this proceeding, the attempts at service were defective and Hitrinov and Empire had a reasonable basis to believe that they were not properly served. (Response of Respondents to Order to Show Cause at 9-10.) They conclude:

Finally, even should the Presiding Officer conclude that service was properly effectuated on [Empire] and/or Mr. Hitrinov, it is clear that, at the very least, Respondents had a reasonable basis for believing that they were not properly served and therefore not obligated to appear. Given the Commission's policy of resolving all doubts in favor of parties against whom default is sought, entry of a default judgment would clearly be unwarranted and inappropriate, especially as Respondents were without counsel in the proceeding at that time.

(*Id.* at 10.) Hitrinov and Empire also state that "as the Presiding Officer may elect to allow Complainants extra time to perfect service, Respondents would be willing to waive the defects if the Presiding Officer decides not to enter a default judgment." (*Id.* at 10 n.5.)

On May 18, 2016, Complainants filed a reply to Hitrinov and Empire's response. Complainants contend that Hitrinov and Empire have failed to demonstrate good cause for setting aside a default. Complainants argue that under the federal civil rules, "when 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, the clerk must enter the party's default." Fed. R. Civ. P. 55(a). Relying on a case construing this rule, Complainants argue that "[i]n determining whether good cause exists to set aside an entry of default, Courts should consider: (1) 'the willfulness of the default'; (2) 'the existence of a meritorious defense'; and (3) 'the level of prejudice that the non-defaulting party may suffer should relief be granted.'" *Addison v. Redman Blacktop, Inc.*, 272 F.R.D. 72, 77 (E.D.N.Y. 2010), quoting *Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167, 171 (2d Cir. 2001). (*See* Complainants' Brief in Reply to the Respondents' Response to the Commission's Notice of Default and Order to Show Cause at 3.)

Complainants contend that the record of the attempts to deliver the Complaint to Hitrinov and Empire establish that Hitrinov and Empire had notice of this proceeding and that they willfully failed to answer or otherwise respond to the complaint in a timely manner, that Hitrinov and Empire cannot demonstrate a meritorious defense on the merits of the Complaint, and that Complainants would suffer prejudice if the default were vacated. (*Id.* at 3-5.)

DISCUSSION

Hitrinov and Empire's contention that entering an initial decision by default would be inconsistent with Commission precedent is well-taken. "The reluctance to decide cases by default judgment is consistent with the underlying philosophy regarding proceedings before administrative agencies like the Commission. Under this philosophy agencies prefer to decide cases based on evidence rather than on defaults and technicalities" *Tak Consulting Engineers v. Bustani*, 28 S.R.R. 581, 583 (ALJ 1998).

A party is not entitled to a default judgment as a matter of right, even where the defendant is technically in default. *Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001). Default judgments are not favored and should be reserved for extreme situations. *Willis v. Freeman*, 83 Fed. Appx. 803, 805 (7th Cir. 2003). Because "defaults are generally disfavored and are reserved for rare occasions, when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party." *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993). "Further, concerns regarding the protection of a litigant's rights are heightened when the party held in default appears *pro se*." *Enron Oil Corp. v. Diakuhara*, 10 F.3d at 96. The Commission, like other administrative bodies, has treated *pro se* litigants with special leniency. *Bernard & Weldcraft Welding Equipment v. Supertrans Int'l, Inc.*, 29 S.R.R. 1340, 1341-1342 (ALJ 2002).

Ndahendekire Barbara v. African Shipping; Njoroge Muhia; Alco Logistics, LLC; Brenda Alexander; and Air 7 Seas Transport Logistics, Inc., 32 S.R.R. 743, 747 (ALJ 2012). This treatment of default situations is consistent with the authorities on which Complainants rely.

"It is well established that default judgments are disfavored," and that "[a] clear preference exists for cases to be adjudicated on the merits." *Pecarsky*, 249 F.3d at 171 (citations omitted). Thus, "in ruling on a motion to vacate a default judgment, all doubts must be resolved in favor of the party seeking relief from the judgment in order to ensure that to the extent possible, disputes are resolved on their merits." *New York v. Green*, 420 F.3d 99, 104 (2d Cir. 2005) (citing *Powerserve Int'l, Inc. v. Lavi*, 239 F.3d 508, 514 (2d Cir. 2001)).

Addison v. Redman Blacktop, Inc., 272 F.R.D. at 77.

Complainants contend that the failure of Hitrinov and Empire to file an answer in a timely manner was willful. Relying on a number of district court cases discussing service under Federal Rule of Civil Procedure 4, Hitrinov and Empire contend that the Commission lacks jurisdiction over Empire because of inadequate service of process, or in the alternative, if the Commission has jurisdiction, they reasonably believed that it does not. (Response of Respondents to Order to Show Cause at 6-10.)

It is not clear that when a respondent has actual notice of a Commission proceeding and a copy of the complaint, failure to serve the complaint in a manner consistent with Federal Rule 4 deprives the Commission of personal jurisdiction over a respondent as Hitrinov and Empire argue. Nevertheless, resolving doubts in Respondents' favor, *Addison v. Redman Blacktop, Inc.*, 272 F.R.D. at 77, *Ndahendekire Barbara v. African Shipping*, 32 S.R.R. at 747, Hitrinov and Empire did not willfully fail to file a timely response to the Complaint. Furthermore, Hitrinov and Empire have agreed to waive any claim of defective service if an initial decision on default is not entered. (Response of Respondents to Order to Show Cause at 10 n.5.)

Complainants argue that Hitrinov and Empire do not have meritorious defenses. "To 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 at law so as to give the factfinder some determination to make.'" *Anilina Fabrique de Colorants v. Aakash Chemicals and Dyestuffs, Inc.*, 856 F.2d 873, 879 (7th Cir. 1988), quoting *Bieganek v. Taylor*, 801 F.2d 879, 882 (7th Cir. 1986). I find that the Answer filed by Hitrinov and Empire sets forth meritorious defenses to the Complaint.

Complainants argue that they are prejudiced by Hitrinov and Empire's delay in responding to the Complaint because they have incurred attorney fees litigating the default motion and Hitrinov and Empire's motion to stay. Where the default was not willful and that Hitrinov and Empire have presented a meritorious defense, any prejudice incurred by Complainants litigating the motion for decision on default does not warrant the entry of an initial decision on default. Hitrinov and Empire presumably would have filed the motion for stay even if they had responded to the Complaint within twenty-five days after the Secretary sent it to them by UPS. Complainants do not argue that any available evidence has been lost or that there has been increased potential for fraud or collusion and there has been no initial decision entered on which they could have claimed reliance. *Addison v. Redman Blacktop, Inc.*, 272 F.R.D. at 82.

I find that it is consistent with Commission precedent and the cases cited by Complainants to decide this proceeding on the merits, not on default. Therefore, the order to show cause is discharged and Hitrinov and Empire's Answer accepted for filing.

Hitrinov and Empire's contentions in their response to the show cause order that the Complaint fails to state a claim for reparations and that the Commission lacks subject matter jurisdiction are more appropriately reached at a later stage in this proceeding.

O R D E R

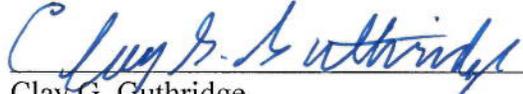
Upon consideration of Complainants' Motion for a Default Judgment Against Respondents, the response to the order to show cause filed by respondents Empire United Lines and Michael Hitrinov a/k/a Michael Khitrinov, Complainants' reply to the response, the Answer filed by Empire and Hitrinov, and the record herein, and the reasons stated above, it is hereby

ORDERED that the Order to Show Cause be **DISCHARGED**. It is

FURTHER ORDERED that Complainants' Motion for a Default Judgment against Respondents be **DENIED**. It is

FURTHER ORDERED that Respondents' Motion for Leave to Reply filed May 2, 2016, be **DISMISSED** as moot. It is

FURTHER ORDERED that Motion for Leave to Supplement Response filed May 6, 2016, be **DENIED**.



Clay G. Guthridge
Administrative Law Judge