

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 07-60534-CIV-DIMITROULEAS  
MAGISTRATE JUDGE: ROBIN ROSENBAUM

HOWARD K. STERN,

Plaintiff,

vs.

JOHN O'QUINN and JOHN M. O'QUINN  
& ASSOCIATES, PLLC d/b/a  
The O'Quinn Law Firm,

Defendants.

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**DEFENDANTS' RESPONSE TO PLAINTIFF'S  
REQUEST FOR THE ENTRY OF DEFAULT JUDGMENT AS TO  
JOHN O'QUINN AND JOHN M. O'QUINN & ASSOCIATES, PLLC**

Defendants, JOHN O'QUINN and JOHN M. O'QUINN & ASSOCIATES, PLLC d/b/a The O'Quinn Law Firm, by and through their undersigned counsel, hereby files hereby respond to Stern's request for an entry of a default judgment, and as grounds therefor would show:

1. Defendants failure to file a timely response in this matter has been fully explained in Defendants' Consolidated Response to Plaintiff's Motion for the Entry of Default and Motion to Set Aside the Clerk's Default, as well as Defendant's Motion to Extend Time for the Filing of an Answer and Response In Opposition to Howard K. Stern's Motion to Strike Defendants' Untimely Answer. Copies of those two motions and the consolidated response, which are identified as Exhibits "A" and "B" to this submission and

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attached hereto and are specifically incorporated by reference therein.

2. As is explained in the consolidated response in Defendant's motion for leave to extend the time for the filing of its Answer in this matter and the Affidavits attached to those motions, the Answer was not filed through the inadvertence of counsel, because of mis-communication concerning the effect of a motion which had been filed with this Court to certify Defendant's right to an immediate appeal from the Order that this Court entered, denying Defendants' Motion to Dismiss the Amended Complaint. Simply put, as is more fully set forth in the incorporated pleadings, undersigned counsel did not recognize that the due date for the filing of the response had not been properly docketed and had not been entered in to the Firm's "double diary" system.

3. Immediately upon learning of the fact that the answer was overdue, Defendants' counsel immediately requested that an attorney in the Firm prepare and file Defendants' Answer in this cause; however, Defendants' counsel was unable to fully explore the reasons as to why the Answer had not been filed, and had not been properly diaried until some point on Tuesday, September 16, 2008 since Defendants' counsel was attending an ex parte hearing which

had been requested by Magistrate Rosenbaum throughout the afternoon of September 15, 2008.

4. Defendants have now filed a Motion for an Extension of Time for the filing of an Answer in this matter, and have explained that the Answer was not filed in this matter due to excusable neglect. If that motion is granted, and if this Court determines to set aside the Clerk's default, Plaintiff's motion for the entry of a default judgment will be rendered moot.

**MEMORANDUM OF LAW**

As STERN clearly concedes in his motion, a default judgment should only be entered if there is some indication that the Plaintiff will suffer prejudice if the Court refuses to enter the default judgment. STERN argues that he has been prejudiced because he has "had to conduct discovery without knowing the full extent of Defendants' defenses and has thus been prejudiced because he has not been able to conduct directly aimed at piercing those defenses..." Defendants would respectfully suggest that this conclusory contention is thoroughly disingenuous, given the fact that Mr. Stern is represented by one of the pre-eminent libel attorneys in this country, who certainly understands the nature of the potential defenses that are traditionally leveled in a case of this nature. Further, those defenses were explored in detail in voluminous Motions to Dismiss which were filed on behalf of the

Defendants. Further, if there was any question as to the nature of those defenses, they were fully explored by this Court itself, in denying those motions, when the Court concurrently noted that the primary defenses advanced in the Motion to Dismiss could more properly be raised by way of formal motions for summary judgment.

This case has been pending since July of last year. While the parties jointly suggested in a preliminary scheduling order the discovery from the parties would be abated during the early stages of this litigation, Mr. Stern's counsel has been engaging in extensive paper discovery since May of this year. Defendants have answered numerous Interrogatories, probing their defenses in this case, and have provided thousands of pages of Firm documents, which have allowed Mr. Stern to explore the factual basis for the investigation that was performed by the O'Quinn Firm not only prior to and during the period of time when allegedly defamatory statements were made by Mr. O'Quinn, but even at points thereafter, to the extent that Mr. Stern has successfully argued that the O'Quinn Firm waived its right to protect some of that documentation through its disclosure of some of the results of its investigation to Rita Cosby, a defendant in a companion case that is pending in the United States District Court for the Southern District of New York. Nor does Mr. Stern point out to this Court that he has been

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deposing many of the same witnesses who have been disclosed by both parties in this cause for many, many months.

Despite the fact that this case has been pending since July, 2007, the only technical "delay" which may have been occasioned by the late filing of the answer is less than thirty (30) days. Mr. Stern cannot argue in good faith to this Court that he would have propounded additional discovery or that his tactics would somehow have changed simply had the Defendants filed their Answer--and the traditional Affirmative Defenses which are routinely plead in a case of defamation-- at the end of August, as opposed to September 16<sup>th</sup>. In fact, it is questionable as to whether or not any kind of additional discovery could have been propounded at that late date, given the discovery deadline that had been established by this Court in its prior Scheduling Order.

Defendants feel constrained to posit this question - what kind of discovery could Mr. Stern have possibly filed addressing the defenses that have been raised by the Defendants in their proposed response that he has not already served upon the Defendants in this matter? Would he have sent additional interrogatories, to supplement those interrogatories which inquired as to the factual basis for each of the allegedly defamatory statements that were made by Mr. O'Quinn? Those interrogatories have already been propounded by Mr. Stern. Would he have sent additional requests

for admission, seeking to require the Defendants to admit that factual statements that were allegedly made by Mr. O'Quinn during various television interviews had no foundation in fact? He sent those very requests for admissions, many months ago. Would he have asked for the precise source of information supporting the statements that were made by Mr. O'Quinn during the interviews in question? Those documents were requested, and have now been provided, after extensive briefing by the parties and hearings before Magistrate Judge Rosenbaum.

The fact remains that Mr. Stern's able counsel sent out extensive discovery probing every potential avenue of the defenses that are traditionally raised by Defendants in a defamation matter-and which were addressed in Defendants' Motion to Dismiss-the very same defenses which have now been incorporated in the Answer that has been filed by the Defendants. Even a cursory review of that discovery will readily reflect that it thoroughly explored the Defendants' ability to demonstrate the truth of Mr. O'Quinn's statements, or his good faith basis for making those statements. That discovery also sought the precise source of the information that Mr. O'Quinn relied upon for each and every statement that was made by Mr. O'Quinn, and which otherwise serve as a basis for Mr. Stern's claims of defamation in this matter.

In fact, as Magistrate Judge Rosenbaum noted in her Omnibus

Discovery Order in this matter on August 29th, the documentation that Mr. Stern has received from the Defendants actually goes far beyond what would ordinarily have been provided to a defamation Plaintiff, and encompasses a wide range of the O'Quinn's Firm's work product, based upon certain findings of waiver by the Magistrate Judge in her Order of August 29<sup>th</sup>.

While it may well be that a number of key depositions in this matter were forestalled due to the time consuming argument on these various privilege issues, the delay in taking those depositions had absolutely nothing to do with the fact that the Defendants were late in filing their Answer. (In fact, if anything, the primary mistake of the parties in this case was in their joint failure to advise this Court of their informal agreement to defer several of the key party depositions until after these privilege issues were resolved, and to seek a formal stay of these proceedings pending resolution of the privilege issues.) Indeed, Mr. Stern does not proffer a single example of tangible discovery that had to be forestalled pending the filing of Defendants' Answer. There is no prejudice, and this Court should not accept what is a clearly transparent attempt to avoid a full and final exposition on the merits of this case, either by way of summary judgment or through a full trial on the merits, because of an unfortunate and

unintended failure to timely file Defendants' Answer to Mr. Stern's Amended Complaint.

WHEREFORE, and for the reasons that have been set forth in the Consolidated Response to the Plaintiff's Motion for Entry of Default Judgment, and Defendants' Motion to Set Aside the Clerk's Default, Defendants respectfully request this Court to enter an Order Denying STERN's request for the entry of a default judgment.

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By: \_\_\_\_\_ /s/

ROBERT M. KLEIN

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WE HEREBY CERTIFY that on September 19, 2008 this document was e-filed using the CMECF system and that a true and correct copy was served via e-mail to: **L. LIN WOOD, ESQ.**, ([llwood@pogolaw.com](mailto:llwood@pogolaw.com)) Powell Goldstein LLP, *Co-counsel for Plaintiff*, One Atlantic Center, 14<sup>th</sup> Floor, 1201 W. Peachtree Street, N.W., Atlanta, GA 30309; and **M. KRISTA BARTH, ESQ.** ([krista@emsattorneys.com](mailto:krista@emsattorneys.com)), Eric M. Sauerberg, P.A., *Co-counsel for Plaintiff*, Suite 102, 200 Village Square, Palm Beach Gardens, FL 33410 **NEIL McCABE, ESQ.**, ([neilm@oglaw.com](mailto:neilm@oglaw.com)) The O'Quinn Law Firm, 440 Louisiana, Suite 2300, Houston, TX 77002 who are listed as recipients as counsel under said system.

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/s/

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