

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA, and)
STATE OF NEW MEXICO, ex rel. STATE)
ENGINEER,)
))
Plaintiffs,)
))
and)
))
ZUNI INDIAN TRIBE, NAVAJO NATION,)
))
Plaintiffs in Intervention,)
))
v.)
))
A & R PRODUCTIONS, et al.,)
))
Defendants.)

No. 01-cv-0072 MV/WPL
ZUNI RIVER BASIN
ADJUDICATION
Subfile No. ZRB-3-0022

ORDER DENYING MOTION TO VACATE DEFAULT JUDGMENT

This matter is before the Court on the “Motion to Vacate Default Judgment” filed by the Joseph F. Neas & Susan S. Neas Revocable Trust (“the Trust”). (Doc. 2934.) Plaintiffs filed a joint response opposing the motion. (Doc. 2941.) Having considered the pleadings, the parties’ other filings, and the relevant law, and being otherwise fully advised in these matters, the Court will deny the Trust’s motion.

BACKGROUND

Debbie A. Byington was named as a defendant in this stream systems adjudication at the inception of this action (*see* Doc. 1 at 3), while her husband John C. Byington was joined as a defendant in 2006 (*see* Doc. 616 at 3). The Byingtons, along with two other parties, are Subfile Defendants in this Subfile Proceeding. (*See id.*; Doc. 2499 at 1.) A waiver of service submitted

by Debbie Byington was filed May 13, 2005 (*see* Doc. 362 at 1, 3; Doc. 362 att. A), and pursuant to a procedural and scheduling order filed by the Special Master (*see* Doc. 561 at 2-3), John Byington submitted a waiver of service on May 30, 2006 (*see* Doc. 727 at 1, 10-11). The remaining Subfile Defendants were served with process in August 2008. (Doc. 1853 at 1, 13-18.) However, none of the Subfile Defendants entered an appearance, and none filed any subfile answer or any other pleadings or documents. (*See* Doc. 1904 at 1-2.)

On October 7, 2008, the United States requested entry of default against Subfile Defendants. (*Id.*) The Clerk entered a certificate of default as to Subfile Defendants and other parties the next day. (Doc. 1908.) Plaintiffs moved for default judgment against Subfile Defendants on January 5, 2010 (Doc. 2499), and the Court granted default judgment in this Subfile Proceeding in Plaintiffs' favor on March 1, 2010 (Doc. 2532). The water rights adjudications in that default judgment remain subject to challenges during the *inter se* phase of proceedings. (*See id.* at 3.)

Over four years later, the Trust filed the instant motion. (Doc. 2934.) In its motion, the Trust asserts that since May 2007 it has been a true owner of the well associated with the water rights at issue in this Subfile Proceeding, yet the documents filed in this Subfile Proceeding name the wrong parties as owners and were never served on the Trust. Attached to the motion is a purported copy of a Warranty Deed conveying the Byingtons' interest in the well in question to Joseph F. and Susan S. Neas as trustees of the Trust. (*See id.* at 4.) Plaintiffs filed a joint response arguing that the Trust was never substituted as a party for the Byingtons, that the Subfile Proceeding appropriately continued against Subfile Defendants, and that the default judgment entered here was proper. (Doc. 2941.)¹ The Trust did not file a reply. (*See* Doc. 2953.)

¹ Plaintiffs certify that they served their response on the trustees by mailing a copy of the document to two of the Neas' known mailing addresses. (Doc. 2941 at 9.)

DISCUSSION

I. Representation of the Trust

Plaintiffs first raise concerns regarding the Trust's representation in this action. The instant motion was signed by trustee Joseph F. Neas on behalf of the Trust. However, Neas does not appear to be an attorney, and no "corporation, partnership or business entity other than a natural person" may appear pro se before this Court. *See* D.N.M.LR-Civ. 83.7. The Trust is advised that if it is to continue in this stream systems adjudication, it must comply with the Court's rules regarding representation. *Cf. Ogden v. San Juan Cnty.*, 32 F.3d 452, 455 (10th Cir. 1994) (citation omitted) (holding that unrepresented litigants are not excused from complying with a court's procedural rules).

II. Motion to Vacate Default Judgment

A default judgment may only be set aside pursuant to Federal Rule of Civil Procedure 60(b), which governs relief from all final judgments. *See* FED. R. CIV. P. 55(c). Rule 60(b) only allows for a final judgment to be set aside for a limited number of reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (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);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). A motion for relief from a final judgment is left to the sound discretion of the Court. *Zimmerman v. Quinn*, 744 F.2d 81, 82 (10th Cir. 1984) (citing *Wilkin v. Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972)).

The Warranty Deed attached to the instant motion purports to convey the Byingtons' interest in the pertinent property to the Trust as of May 23, 2007, and Plaintiffs do not appear to challenge that document's authenticity.² Nonetheless, as Plaintiffs assert, this Subfile Proceeding was appropriately continued against the Byingtons and the other Subfile Defendants. Rule 25 states that "[i]f an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party." FED. R. CIV. P. 25(c). Even if no motion to substitute or join is made under this provision, any judgment against the original party will be binding as to his successor. *See, e.g., In re Bernal*, 207 F.3d 595, 598-99 (9th Cir. 2000) (quoting *Deauville Assoc. v. Murrell*, 180 F.2d 275, 277 (5th Cir. 1950)); *LiButti v. United States*, 178 F.3d 114, 124 (2d Cir. 1999); *Minn. Min. & Mfg. Co. v. Eco Chem., Inc.*, 757 F.2d 1256, 1263-64 (Fed. Cir. 1985) (citation omitted); *Capitol Packaging Corp. v. Stone Container Corp.*, 98-cv-01641-REB-BNB, 2006 WL 6840942, at *1-2 (D. Colo. June 27, 2006) (unpublished) (quoting 7C Wright & Miller, *Fed. Prac. & Proc.: Civil* § 1958 (2d ed. 1986)).

John and Debbie Byington had each been served process prior to the transfer of the relevant property interests in May 2007. Because neither the Byingtons, the Trust, nor any other party moved to substitute the Trust for the Byingtons after the property interests were transferred, it was appropriate for this Subfile Proceeding to continue against the Byingtons. Moreover, despite the lack of substitution, the default judgment against the Byingtons is binding on the Trust. *See, e.g., In re Bernal*, 207 F.3d at 598-99; *see also In re Bernal*, 223 B.R. 542, 548

² However, Plaintiffs err in stating that the Warranty Deed only purports to convey John Byington's interest in the property to the Trust. In fact, the document appears to grant the property interests of both Byingtons to the Trust and is signed by both husband and wife. (*See* Doc. 2934 at 4.)

(9th Cir. B.A.P. 1998). Accordingly, the Trust has failed to show that it is entitled to relief under any of the provisions of Rule 60(b).

This does not mean that the Trust is precluded from further activity in this action. Far from it—the adjudication of water rights in this Subfile Proceeding remains subject to the rights of other claimants as determined during the *inter se* phase (*see* Doc. 2532 at 3), and the Trust may move at any time to substitute for the Byingtons pursuant to Rule 25(c). However, as to the default judgment in this Subfile Proceeding, the relief that the Trust seeks is not warranted. The Court will therefore deny the Trust’s motion to set aside the default judgment.

III. Bawolek Response

Plaintiffs were not the only parties who responded to the Trust’s motion. For reasons that are not entirely clear, Edward J. and Suzan J. Bawolek, subfile defendants in Subfile No. ZRB-2-0014, filed a response arguing that the Trust’s motion to vacate should be denied due to the Trust’s failure to procure proper representation pursuant to D.N.M.LR-Civ. 83.7. (Doc. 2937.) The rub, it seems, is that the Special Master previously ordered the Edward J. Bawolek and Suzan J. Bawolek Trust to obtain counsel before filing any further documents in a subproceeding of this stream systems adjudication, *see United States v. State of New Mexico ex rel. State Engineer*, 07-cv-681 BB, Doc. 151 at 13 (D.N.M. Jan. 3, 2008) (unpublished), and the Bawoleks are now irked that the Trust has attempted to file documents without similarly obtaining counsel. Plaintiffs filed a joint “reply” asking that the Court “simply disregard the Bawolek Response.” (Doc. 2940.)

Because the Bawoleks are not parties to the instant Subfile Proceeding, they have no standing to oppose the Trust’s motion. Nor do they provide any basis for concluding that any disposition of the motion would affect them in any way during the subfile phase of proceedings.

Simply put, the Bawoleks' participation in this subfile proceeding is neither required nor appropriate. Accordingly, the Court will exercise its inherent power to control and manage its docket and strike the Bawoleks' response as frivolous.

CONCLUSION

For the reasons stated above, the Court:

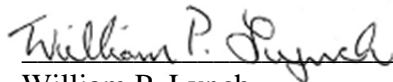
- (1) DENIES the Trust's Motion to Vacate Default Judgment (Doc. 2934);
- (2) STRIKES the Bawoleks' "response" (Doc. 2937);
- (3) ORDERS that, before filing any further motions, pleadings, or other documents in this action, the Trust will retain counsel pursuant to D.N.M.LR-Civ. 83.7 and will ensure that counsel files an entry of appearance on its behalf; and
- (4) ORDERS that Plaintiffs to serve on the Trust and its trustees a physical copy of this Order by mailing a copy to the known addresses of the Trust and the trustees within **one (1) day** of the filing of this document.

IT IS SO ORDERED.



UNITED STATES DISTRICT JUDGE

Approved:



William P. Lynch
United States Magistrate Judge

A true copy of this order was served on the date of entry--via mail or electronic means--to counsel of record and any pro se party as they are shown on the Court's docket.