

STATE OF IDAHO )  
County of KOOTENAI )  
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AT \_\_\_\_\_ O'Clock \_\_\_\_ M  
CLERK OF DISTRICT COURT

Deputy \_\_\_\_\_

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE**

**STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

WASHINGTON TRUST BANK,	)	Case No.	<b>CV 2012 1251</b>
	)		
<i>Plaintiff,</i>	)		
vs.	)		
<b>BERG, INC., an administratively dissolved</b>	)		<b>MEMORANDUM DECISION AND</b>
<b>Idaho corporation, CASEY W. BERG, an</b>	)		<b>ORDER DENYING DEFENDANTS</b>
<b>individual and PATRICIA L. BERT, an</b>	)		<b>MOTION FOR EXTENSION OF TIME</b>
<b>individual,</b>	)		<b>TO FILE RESPONSIVE PLEADING</b>
	)		
<i>Defendants.</i>	)		

**I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.**

This matter is before the Court on Defendants Motion for Extension of Time to File Responsive Pleading. Plaintiff Washington Trust Bank (WTB) extended credit to defendant Berg, Inc. on August 9, 2001, in the amount of \$34,700.00. Berg, Inc. executed a promissory note in that principal amount and executed an agreement granting a security interest to WTB in its "Inventory, Chattel Paper, Accounts, Equipment, and General Intangibles" to secure the obligation. Complaint, p. 2. Casey and Patricia Berg each executed a guaranty of Berg, Inc.'s obligations. Complaint, p. 3, ¶ 10. Additional credit was extended to Berg, Inc. on March 20, 2009, in the form of an extension of credit, pursuant to the parties' Commercial Credit Line Agreement. *Id.*, at ¶¶ 11-12. Following Berg, Inc.'s alleged default, WTB filed its Complaint on February 10, 2012. An application for entry of default against Berg, Inc. was filed on March 21, 2012, along with an affidavit in support thereof. This Court entered its Order for Entry

of Default against Berg, Inc. on March 26, 2012, and Entry of Default Against Berg, Inc. was entered on that date.

Counsel for defendants Berg, Inc., Casey and Patricia Berg filed his Notice of Appearance on March 26, 2012. He thereafter filed a motion for enlargement of time in which to answer the Complaint on April 9, 2012. WTB filed its objection to the motion for enlargement of time on May 1, 2012. In the interim, on April 4, 2012, WTB filed its 3-day notice of intent to take default, and an application for entry of default and supporting affidavit on May 1, 2012. This matter is not yet scheduled for trial.

On the day of the May 8, 2012, hearing, counsel for defendants called the Court's Deputy Clerk, and indicated he felt since WTB had filed again for default, the defendants' Motion for Extension of Time was moot. The Court instructed the Deputy Clerk to inform defendants' counsel that the hearing on defendants' Motion for Extension of Time would be held as scheduled. Counsel for defendants did not attend the hearing. Counsel for plaintiffs attended the hearing.

## **II. STANDARD OF REVIEW.**

The decision to grant or deny enlargement is one of discretion. Idaho Rule of Civil Procedure 6(b) states:

When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the parties, by written stipulation, which does not disturb the orderly dispatch of business or the convenience of the court, filed in the action, before or after the expiration of the specified time period, may enlarge the period, or the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but the time may not be extended for taking any action under rules 50(b), 52(b), 59(b), (d), (e) and 60(b) except to the extent and under the conditions stated in them.

I.R.C.P. 6(b). (emphasis added). Thus, this Court in its discretion may, upon the motion to enlarge time filed in this matter, permit an answer and jury demand to be filed. The motion to enlarge time was filed on April 9, 2012, less than twenty days from the Bergs' counsel's Notice of Appearance having been filed. There is no evidence before the Court at this point to demonstrate the good cause pursuant to which the extension is sought, the motion itself states only that the defendants' documentary evidence concerning the claims is "rather voluminous". Motion for Extension of Time to File Responsive Pleading, p. 1. Casey and Patricia Berg seek an Order extending the time within which they must file a responsive pleading until May 8, 2012, the very date hearing on the motion is noticed for. *Id.*

WTB objects to the motion because hearing on May 8, 2012, amounts to more than two months having elapsed since Bergs were served with the Complaint and Summons and no good cause for an extension has been demonstrated. Objection to Defendants' Motion for Extension of Time to File Responsive Pleading, p. 1. It is WTB's belief that Bergs seek this additional time to file for bankruptcy and thereby avoid a judgment in this matter. *Id.*, p. 2. Counsel for WTB restated that belief at the May 8, 2012, oral argument.

However, that belief of impending bankruptcy is not relevant. What is relevant is whether Bergs and Berg, Inc., have proven "good cause" for their failure to answer.

As to the motion for extension of time in which to answer, the matter is committed to the Court's discretion. The Bergs' motion was filed before expiration of the twenty day time limit following their appearance in this case, as recognized by WTB's references to the good cause standard, not the excusable neglect standard which applies if a motion for enlargement is filed after expiration of the specified time period, in this case to answer. However, no good cause has been demonstrated by

Bergs. Bergs' claims that the defendants' documentary information concerning plaintiff's claims is rather voluminous is not supported by any admissible evidence. There are no affidavits. The claim itself ignores the obvious fact that these materials were only in the hands of *the defendants themselves*, thus, the defendants' failure to turn over these allegedly "voluminous" documents to their attorney and discuss such with their attorney, is *only the fault of defendants*. The materials in the case file are not voluminous, and there is nothing before the Court to support Bergs' claim that their documentary evidence is so voluminous as to justify an enlargement of time to answer being necessary. Nothing the defendants have submitted establish "good cause", and since counsel for defendants chose not to show up to argue the Motion for Extension of Time, no good cause was shown at the May 8, 2012, hearing.

There is nothing about the renewed motion for default that would render the Motion for Extension of Time for Filing Answer moot. To the contrary, if the Motion for Extension of Time for Filing Answer is denied, then, and only then, does the renewed motion for entry of default become at issue.

#### **IV. CONCLUSION AND ORDER.**

For the reasons stated above,

IT IS HEREBY ORDERED, the Court properly exercises its discretion and denies Defendants' Motion for Extension of Time to File Responsive Pleading.

Entered this 8<sup>th</sup> day of May, 2012.

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John T. Mitchell, District Judge

#### **Certificate of Service**

I certify that on the \_\_\_\_\_ day of May, 2012, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Cameron Phillips	664-2114	Linsey Simon	667-0517

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Jeanne Clausen, Deputy Clerk