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1 Case No. 13-CV-0114

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CLERK

A. NEWTON DEPUTY

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6 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF DOUGLAS

8  
9 D&M-MI, LLC, a Nevada limited  
10 liability company, now known as  
11 Metalast Surface Technology,  
12 LLC,

13 Plaintiff,

14 vs.

ORDER SETTING ASIDE DEFAULT,  
DENYING DEFAULT JUDGMENT,  
DISMISSING ACTION AND AWARDDING  
ATTORNEY'S FEES

15 METALAST INTERNATIONAL, LLC, a  
16 Nevada limited liability  
17 company; METALAST  
18 INTERNATIONAL, INC., a Nevada  
19 corporation,

20 Defendants.

21  
22 THIS MATTER comes before the Court on Defendants' Motion to  
23 Dismiss Action, Set Aside Entry of Default, and for Award of  
24 Attorney's Fees and Costs, filed April 26, 2019. The motion has  
25 been fully briefed and is ripe for consideration. Also considered  
26 is Plaintiffs' Application for Default Judgment Against Metalast  
27 International, LLC, nka MI94, LLC. Good cause appearing, the  
28 Court finds and orders as follows:

Procedural History and Facts

On April 16, 2013, Plaintiffs initiated this action through  
the filing of a Verified Complaint & Petition for Appointment of  
Receiver ("Complaint").

1           On the same day, Plaintiffs filed a *Motion for Appointment of*  
2 *Receiver and Preliminary Injunction* seeking a receivership over  
3 Metalast International, LLC ("MILLC"). In conjunction, Plaintiffs  
4 filed a *Motion for Order Shortening Time* requesting an expedited  
5 hearing on their request for receivership.

6           On April 18, 2013, the Court entered an *Order Shortening Time*  
7 setting a hearing on the *Motion for Appointment of Receiver and*  
8 *Preliminary Injunction* for April 25, 2013.

9           An *Affidavit of Service* was later filed reflecting service of  
10 the *Complaint, Motion for Appointment of Receiver and Preliminary*  
11 *Injunction, Motion for Order Shortening Time, and Order Shortening*  
12 *Time* on MILLC's resident agent on April 18, 2013.

13           On April 25, 2013, just seven days after MILLC was served  
14 with the *Complaint* and well before the time for answering had run,  
15 the Court entered an *Order Granting Motion for Appointment of*  
16 *Receiver and Preliminary Injunction*. The receiver was granted  
17 broad authority over MILLC and officers and agents were, in a  
18 sense, locked out. The receiver did not file and answer to the  
19 *Complaint*.

20           By way of the receivership, MILLC's assets were sold to  
21 Plaintiffs. On December 19, 2013, the Court entered an *Order*  
22 *Termination Receivership* stating, "As a result of the sale of the  
23 assets of the Company, the Receivership has no funds or monies in  
24 which to operate the Receivership, and has no assets in which to  
25 further conduct the business and operations of the Company." *Id.*  
26 at p. 6.

27           Plaintiffs made no further effort to prosecute the action  
28 until April 25, 2014, one year after initiating the action and

1 four months after the conclusion of the receivership. On that  
2 date, Plaintiffs filed a *Motion for Leave to File Amended*  
3 *Complaint*, attaching the proposed *Amended Complaint* ("FAC") as an  
4 exhibit. The motion and attachment were served on MILLC. The  
5 motion said nothing of MILLC's failure to answer and gave no  
6 indication of an intent to pursue default. Instead, the motion  
7 demonstrated a clear intention to pursue the FAC. Defendants did  
8 not oppose the motion.

9 On June 10, 2014, Plaintiffs filed and served a *Notice of*  
10 *Submission of Proposed Order, for Motion for Leave to File Amended*  
11 *Complaint*. The proposed order, attached as an exhibit to the  
12 notice, provided in relevant part, "The Clerk of the Court shall  
13 file the amended complaint submitted with the Notice of Proposed  
14 Order." Plaintiffs attached as an exhibit "an executed amended  
15 complaint for filing..."

16 On June 16, 2014, the Court signed and filed the proposed  
17 *Order Granting Motion for Leave to File Amended Complaint*.  
18 Despite the order, the FAC was never filed or served. The  
19 original executed FAC remains attached as an exhibit to the *Notice*  
20 *of Submission of Proposed Order, for Motion for Leave to File*  
21 *Amended Complaint*.

22 Plaintiffs took no further action to prosecute the *Complaint*  
23 or the FAC until March 20, 2018. On that date, Plaintiffs filed,  
24 but did not serve, an *Application for Entry of Clerk's Default*  
25 *Against Metalast International, LLC nka MI94, LLC*. Plaintiffs  
26 requested entry of default against MILLC for failing to answer the  
27 *Complaint*. Plaintiffs made no mention of the FAC. Plaintiffs  
28 made no mention of any attempt to inquire of MILLC's counsel

1 regarding any intent to proceed. *See, Order, February 22, 2019.*  
2 On the same day, *Clerk's Default Against Metalast International,*  
3 *LLC nka MI94, LLC* was entered.

4 On April 2, 2018, Plaintiffs filed, but did not serve, an  
5 *Application for Default Judgment against Metalast International,*  
6 *LLC NKA MI94, LLC.* Plaintiffs request a default judgment on the  
7 *Complaint* against MILLC in an amount exceeding \$9,000,000.00  
8 inclusive of interest. Plaintiffs state for the first time that  
9 after being granted leave to file the *FAC*, they decided not to  
10 pursue the *FAC*. But Plaintiffs never alerted the Court or  
11 Defendants of said intent.

12 On February 22, 2019, the Court directed Plaintiffs to notice  
13 Defendants. *Order, February 22, 2019.* Defendants filed the  
14 pending motion on April 26, 2019.

15 Clerk's Default

16 Defendants request that the Court vacate the *Clerk's Default*  
17 *Against Metalast International, LLC nka MI94, LLC.*

18 Default may be set aside for good cause. NRCP 55(c); NRCP  
19 77(c)(2). "Good cause" in the context of NRCP 55(c) "is broad in  
20 scope, and includes the 'mistake, inadvertence, surprise and  
21 excusable neglect' referred to in NRCP 60(b)(1)." *Intermountain*  
22 *Lumber v. Gens Falls*, 83 Nev. 126, 129 (1967). The term does not  
23 include inexcusable neglect. *Id.* at 130.

24 After serving the *Complaint* and after the time to answer had  
25 run, Plaintiffs did not request default on the *Complaint* but  
26 rather sought and were granted leave of court to file the *FAC*.  
27 Plaintiffs executed the *FAC* and attached it as an exhibit to their  
28 request "for filing" upon being granted leave. After being

1 granted leave, Plaintiffs took no further action to prosecute the  
2 FAC. At no time did Plaintiffs inform the Court or Defendants of  
3 a desire to abandon the FAC and proceed on the *Complaint* or  
4 inquire of Defendants' intent to defend. Plaintiffs, taking  
5 advantage of the fortuitous failure of the clerk to file the FAC,  
6 obtained a clerk's default on the *Complaint* without mentioning the  
7 FAC to the clerk. Plaintiffs now seek default judgment in an  
8 amount exceeding \$9,000,000.00.

9 Given the timing of the service of the *Complaint* and the  
10 granting of the receivership, MILLC was justified or, at the very  
11 most acted with excusable neglect, in failing to answer the  
12 complaint within 20 days of service. Seemingly in recognition,  
13 Plaintiffs did not pursue default at that time but rather sought  
14 leave to file a FAC after the receivership concluded. MILLC,  
15 which was formally noticed by way of court order that a FAC was  
16 forthcoming, was justified in taking no further action when the  
17 FAC was never served. Indeed, it would be a good trick if a  
18 litigant was allowed to file and serve a complaint, inform  
19 everyone that an amended complaint is forthcoming, obtain leave to  
20 file an amended complaint, obtain an order directing the clerk to  
21 file the amended complaint, and then turn around years later and  
22 default the opposing party on the original complaint based upon  
23 the FAC never having been filed. Plaintiffs' pursuit of default  
24 under these circumstances was unfair to Defendants and was  
25 accomplished without candor to the tribunal.

26 The Court finds good cause to set aside the *Clerk's Default*  
27 *Against Metalast International, LLC nka MI94, LLC*. In accord,  
28 Plaintiffs' *Application for Default Judgment against Metalast*

1 *International, LLC NKA MI94, LLC* is denied.

2 Failure to Prosecute, NRCP 41(e)

3 An action must be dismissed if not brought to trial within  
4 five years. NRCP 41(e)(2)(B). The *Complaint* was filed on April  
5 16, 2013. Plaintiffs had until April 16, 2018 to bring the action  
6 to trial. *Id.* The case sat dormant until Plaintiffs filed the  
7 *Application for Entry of Clerk's Default Against Metalast*  
8 *International, LLC nka MI94, LLC*, on March 20, 2018 (four years  
9 and 11 months after initiation of the action).

10 Plaintiffs never had the action set for trial. Plaintiffs  
11 contend, however, that the *Clerk's Default* is the equivalent of  
12 trial.

13 In the context of NRCP 41(e), "trial" is "the examination  
14 before a competent tribunal, according to the law of the land, of  
15 questions of fact or of law put in issued by the pleadings, for  
16 the purpose of determining the rights of the parties." *Monroe v.*  
17 *Columbia Sunrise Hospital*, 123 Nev. 96, 100 (2007) (internal  
18 quotations omitted). When a court ruling does not resolve the  
19 entire action, the ruling does not constitute a trial and the  
20 plaintiff must continue to advance the remaining claims within  
21 five years. *Id.* (providing that proceedings leading to a complete  
22 grant of summary judgment constitute trial under NRCP 41(e), but  
23 proceedings leading to a denial of summary judgment do not); *Allyn*  
24 *v. McDonald*, 117 Nev. 907, 910 (2001) (establishing that  
25 proceedings leading to a district court's ruling disposing of one  
26 issue and not resolving the entire action did not bring the case  
27 to trial under NRCP 41(e)).

28 The entry of default by a clerk is a ministerial act, not an

1 examination of the facts by a tribunal. *See, eg., Opaco Lumber v.*  
2 *Phipps*, 75 Nev. 312, 314 (1959). A clerk's default does not  
3 resolve all issues in an action. *Estate of Lomastro ex rel.*  
4 *Lomastro v. Am. Family Ins. Grp.*, 124 Nev. 1060, 1068  
5 (2008) (providing that while entry of default generally resolves  
6 the issues of liability and causation, it leaves open the extent  
7 of damages); *compare* NRCP 55(a) (providing when a clerk shall  
8 enter default), with NRCP 55(b) (the procedure for obtaining a  
9 default judgment). The Order dated February 22, 2019,  
10 demonstrates this point.

11       The *Clerk's Default* does not constitute bringing the action  
12 to trial within the context of NRCP 41. This case demonstrates  
13 fully why this is so. Plaintiffs obtained the default by  
14 presenting the clerk with an application for default without  
15 notice and without conferring with Defendants' counsel. NRCP  
16 3.5A; *Landreth v. Malik*, 127 Nev. 175, 188-190 (2011). Plaintiffs  
17 obtained the default by failing to inform the clerk of material  
18 facts, i.e., the circumstances surrounding the FAC. Plaintiffs'  
19 application for default did not satisfy the requirement of  
20 bringing the action to trial within five-years.

21       Plaintiffs' *Application for Default Judgment against Metalast*  
22 *International, LLC NKA MI94, LLC*, filed fourteen days prior to the  
23 five-year limitation, likewise does not satisfy NRCP 41(e) as the  
24 application is being denied. *See, United Ass'n of Journeymen v.*  
25 *Manson*, 105 Nev. 816, 819-20 (1989); *Monroe v. Columbia Sunrise*  
26 *Hospital*, 123 Nev. 96, 100 (2007).

27       Because Plaintiffs failed to bring this action to trial  
28 within five years, the action must be dismissed. NRCP

1 41(e)(2)(B). The Court, having considered all of the factors  
2 provided in *Hunter v. Gang*, 132 Nev. 249, 260, 377 P.3d 448, 456  
3 (2016) and *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan*  
4 *Chase Bank, N.A.*, 133 Nev.Adv.Rep. 3, 388 P.3d 226 (2017), finds  
5 that dismissal with prejudice is warranted. Specifically,  
6 Plaintiffs did not exercise due diligence in prosecuting this  
7 action and their conduct in seeking default, as described herein,  
8 was inappropriate. Plaintiffs have not provided an acceptable  
9 excuse, let alone any excuse, for the delay. By doing nothing to  
10 prosecute the *Complaint* or the *FAC*, Plaintiffs have not  
11 demonstrated that the claims have merit and the statute of  
12 limitations has most likely run.

13 Attorney's Fees

14 This action is being dismissed with prejudice more than five  
15 years after inception due to Plaintiffs' failure to diligently  
16 prosecute. Defendants are the prevailing party. Plaintiffs  
17 misled the Court and Defendants by way of their applications for  
18 default and default judgment on the *Complaint* after being granted  
19 leave to file the *FAC*. Plaintiffs' pursuit of default and a \$9  
20 million default judgment in the manner described herein was not  
21 done upon reasonable grounds. Defendants are awarded reasonable  
22 attorney's fees accrued in opposing the application for default  
23 judgment and/or pursuing the pending motion. NRS 18.010(2)(b);  
24 NJDCR 23.

25 Other Issues Raised by Defendants

26 Given the Court's finding herein, the Court does not consider  
27 the other issues raised by Defendants.

28 **IT IS HEREBY ORDERED** that Defendants' *Motion to Set Aside*



1 *Entry of Default is GRANTED. The Clerk's Default against Metalast*  
2 *International, LLC nka MI94, LLC, entered March 20, 2018, is set*  
3 *aside.*

4 **IT IS FURTHER ORDERED** that Plaintiffs' *Application for*  
5 *Default Judgment Against Metalast International, LLC nka MI94,*  
6 *LLC, is DENIED.*

7 **IT IS FURTHER ORDERED** that Defendants' *Motion to Dismiss*  
8 *Action is GRANTED.* The action is dismissed with prejudice.

9 **IT IS FURTHER ORDERED** that Defendant's *Motion for Attorney's*  
10 *Fees is GRANTED.* Defendant shall, within 15 judicial days of this  
11 order, file and serve documentation supporting the amount of  
12 attorney's fees accrued in opposing Plaintiffs' application for  
13 default judgment and/or pursuing the pending motion.

14 DATED this 19<sup>th</sup> day of July, 2019.

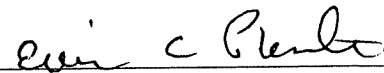
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17 THOMAS W. GREGORY  
18 DISTRICT JUDGE  
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