

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11210

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
November 5, 2003

In the Matter of

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ORDER DENYING MOTION
TO SET ASIDE DEFAULT

DARIUS L. LEE

On January 10, 2002, the Securities and Exchange Commission (SEC or Commission) filed a civil injunctive action against Darius L. Lee (Lee) and others, charging violations of the securities registration and antifraud provisions of the federal securities laws, and seeking injunctive and ancillary relief. SEC v. Jean Pierre, 02 Civ. 253 (S.D.N.Y.) (SWK). On June 25, 2003, the district court granted the Commission's application for summary judgment against Lee. In doing so, the court found that Lee violated Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), and Rule 10b-5 thereunder. The court permanently enjoined Lee from future violations of those provisions of the securities laws. The court also ordered Lee to disgorge ill-gotten gains, plus prejudgment interest, and pay a civil monetary penalty.

The Commission instituted this follow-on administrative proceeding on August 8, 2003, to determine if further remedial action was appropriate and in the public interest pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Investment Advisers Act of 1940. The matter was assigned to my docket. I issued an Order Making Findings And Imposing Remedial Sanctions By Default (Default Order) on September 8, 2003. I determined that Lee received the Order Instituting Proceedings (OIP) and failed to file an Answer within the time allowed. I deemed the allegations in the OIP to be true and concluded that it was in the public interest to bar Lee from association with any broker, dealer, or investment adviser.

On September 17, 2003, I received a letter from Lee which, liberally construed, could be considered a motion to vacate the Default Order. Because Lee had not served the Division of Enforcement (Division), this Office immediately provided a copy of Lee's letter to the Division. Pursuant to Rules 111(e) and 155(b) of the Commission's Rules of Practice, I then held a telephonic conference on October 9, 2003. At that conference, I afforded the parties an opportunity to address the issue of whether I should or should not set aside the Default Order. I now conclude that Lee's motion to vacate the Default Order should be denied for the reasons identified below.

First, service of the OIP was proper. The Office of the Secretary mailed a copy of the OIP to Lee in care of his grandmother's residence in Queens, New York. Lee acknowledges that he lived at that address at the time (Return address on envelope containing motion to vacate Default Order; Telephonic Conference of October 9, 2003, Transcript page 5, hereafter "Tr. ___"). Evelyn Darity, Lee's grandmother, signed a United States Postal Service receipt for the OIP on August 14, 2003. I thus conclude that the OIP was properly delivered on August 14, 2003, at Lee's usual place of abode, and that a person of suitable age and discretion then residing therein acknowledged receipt. See Rule 141(a)(2)(i) of the Commission's Rules of Practice.

Second, Lee has never filed an Answer or a motion for an extension of time to answer in this administrative proceeding. Under the terms of the OIP and Rule 220 of the Commission's Rules of Practice, Lee was required to answer to the OIP within twenty days, or by September 3, 2003. Lee acknowledges that he was available in New York City at all times between August 14 and September 3, 2003 (Tr. 8-9). Lee's only explanations for his failure to appear or defend are his lack of legal training and his pro se status. I hold these explanations insufficient to establish good cause.

Third, Lee has failed to offer a meritorious defense in this administrative proceeding. After listening to Lee at the conference, it is apparent that he is more upset about the underlying injunction than he is about this follow-on administrative proceeding (Tr. 9-11, 13). Lee does not dispute the fact of the injunction; rather, he claims that the district court erred in granting it (Tr. 9-18). After extended discussion, Lee now understands that, if he wishes to challenge the injunction, he must seek relief in the federal court system and not in the administrative forum (Tr. 12-13). He expressed his intention to do so (Tr. 12-13).

Fourth, the equities do not favor reopening this administrative proceeding. In his motion to vacate the Default Order, Lee alleged impropriety on the part of the Division's staff. However, Lee has not sustained his burden of demonstrating such misconduct. Nor can Lee's failure to file an Answer in this administrative proceeding be considered an isolated event. The district court granted the underlying injunction only after the Commission had moved for summary judgment and Lee had failed to oppose it (Tr. 20). Under the circumstances, Lee has failed to show good cause for setting aside the Default Order.

IT IS ORDERED THAT Darius L. Lee's motion to vacate the Default Order of September 8, 2003, is denied. If Lee wishes to seek review of this Order by the Commission, he must do so within twenty-one days after the service of this Order (Tr. 4-5). Cf. Rule 360(b) of the Commission's Rules of Practice, as applied in Richard Cannistraro, 53 S.E.C. 388 (1998).



James T. Kelly
Administrative Law Judge