

Eastern District of California

January 29, 2015 at 2:30 p.m.

- [KMF-1] Request for Order Dismissing Adversary Complaint Without Prejudice
filed 1/21/15 [Dckt 24]

2. [13-91701](#)-E-7 MARVAIS WADEN AND SHAIMA ORDER TO SHOW CAUSE
 [14-9021](#) KAKAR RHS-2 11-26-14 [[21](#)]
DAMON REED, GUARDIAN AD LITEM
FOR MINOR PAYTEN E. V. WADAN

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Kenneth Foley, Debtor, Chapter 7 Trustee, other parties requesting special notice, and the Office of the United States Trustee on November 28, 2014. The court computes that 62 day's notice has been provided.

The Order to Show Cause was issued to have Plaintiffs, Kenneth Foley, show cause why the court should not dismiss this adversary proceeding for failure to prosecute.

The court's tentative decision is to discharge the Order to Show Cause.

On November 26, 2014, the court issued an Order to Show Cause why the court should not dismiss the adversary proceeding for failure to prosecute. Dckt. 21.

ORDER TO SHOW CAUSE

The court, in the Order to Show Cause, required the response of counsel to address several issues. First, to address what appeared to be the lack of prosecution. In reviewing the current Complaint, the court noted that it states a claim for monetary damages (which claims are being prosecuted in state court). No federal law claims are pleaded in the Complaint and no relief under the Bankruptcy Code is requested in the prayer. However, the Complaint is titled "ADVERSARY COMPLAINT FOR DAMAGES EXEMPT FROM DISCHARGE [FRCP rule 7(a)(1) & 11 USC 6523]." (It appears that the reference to "11 USC 6523" is a typographical error, with the typist's finger hitting the 6 key and 5 key at the same time. The provisions of 11 U.S.C. § 523 state the grounds by which specific debts are nondischargeable.)

Though the court could dismiss the Complaint, the pleadings and documents filed in this case state that the person for whom the damages are sought is a minor, depending on his fiduciary guardians and this Counsel to make sure that his rights are enforced.

NOTICE OF DISMISSAL OF ADVERSARY PROCEEDING

Plaintiffs filed a "Request for Order Dismissing Adversary Complaint Without Prejudice" on January 21, 2015. Dckt. 24. Plaintiffs state that request for dismissal is being made because the relief from stay previously

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granted by this court allows the Plaintiffs to recover the damages which Debtors insurance covers and is not seeking any damages from the Debtors' estate. Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rule of Bankruptcy Procedure 7041 allows the Plaintiff to dismiss a complaint without order of the court. If an order is sought, then such relief is sought by motion. Fed. R. Civ. P. 41(a)(2) and Fed. R. Bankr. P. 7041.

DISCUSSION

It appears that Plaintiff has determined that it does not need or want to proceed with this litigation. If Plaintiff confirms that the Complaint has been dismissed by the Notice filed, the Clerk can proceed with closing the Adversary Proceeding file. If Plaintiff instead seeks relief from this court pursuant to Rule 41(a)(2), then an appropriate motion may be filed and adjudicated.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is discharged, no sanctions ordered, and the case shall proceed in this court.

3. [12-93039](#)-E-7 DAVID MCCOY
[14-9028](#)
FARRAR V. MERCHANT

STATUS CONFERENCE RE: COMPLAINT
11-25-14 [[1](#)]

Dismissed 1/22/15

Final Ruling: No appearance at the January 19, 2015 Status Conference is required.

Plaintiff's Atty: Carlos M. Ambriz
Defendant's Atty: unknown

Adv. Filed: 11/25/14
Answer: none

Nature of Action:
Recovery of money/property - turnover of property

The Adversary Proceeding having been dismissed, the Status Conference is removed from the Calendar.
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Notes:

[HCS-1] Notice of Voluntary Dismissal Without Prejudice filed 1/22/15 [Dckt 8]

4. [13-90465-E-7](#) KIMBERLY VEGA
[14-9004](#)
MCGRANAHAN V. VEGA ET AL

CONTINUED PRE-TRIAL CONFERENCE
RE: COMPLAINT
1-29-14 [[1](#)]

Plaintiff's Atty: Steven S. Altman
Defendant's Atty:
Pro Se [Kimberly Vega]
Pro Se [Maria Rangel]
Pro Se [Victor Vega]

Adv. Filed: 1/29/14
Answer:
3/3/14 [Kimberly Vega]
6/26/14 [Maria Rangel]
6/26/14 [Victor Vega]

Nature of Action:
Approval of sale of property of estate and of a co-owner
Declaratory judgment

The Status Conference is xxxxxxxxxxxxxxxxxxxx.
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Notes:

Continued from 10/30/14 to afford the Parties the opportunity to consummate the settlement and dismiss this Adversary Proceeding.

JANUARY 29, 2015 STATUS CONFERENCE

On November 11, 2014, the court approve a Settlement of this Adversary Proceeding in the Kimberly Vega bankruptcy case. 13-90465, Order Dckt. 101. On December 15, 2014, the Chapter 7 Trustee (Plaintiff in this Adversary Proceeding) reported completion of the sale of property which was a term of the Settlement. *Id.*, Report Dckt. 102.

5. [14-90473-E-7](#) ROBERT WOJTOWICZ AND CONTINUED REQUEST FOR ENTRY OF
[14-9023](#) SHERRI HERTZIC-WOJTOWICZ DEFAULT
HERTZIC-WOJTOWICZ V. IRM 11-6-14 [[11](#)]
CORPORATION

No Tentative Ruling:

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on August 14, 2014. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Entry of Default Judgment is xxxxxxxx.
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Sherri Hertzic-Wojtowicz ("Plaintiff-Debtor") requests entry of default of IRM Corporation ("Defendant") in this adversary proceeding on November 6, 2014. Dckt. 11. Plaintiff-Debtor alleges that a summons for this case was issued on July 14, 2014. Plaintiff-Debtor then served the summons and complaint properly and timely on Defendant on July 28, 2014. Defendant was required to file an answer or other response to the complaint on or before August 13, 2014, but Defendant failed to do so. The court has not granted Defendant an extension of time to file a response to the complain in this proceeding.

Plaintiff-Debtor requests that the default of the Defendant be entered.

NOVEMBER 20, 2014 HEARING

The court continued the hearing to January 29, 2015 at 3:00 p.m. Dckt. 23.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy

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Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. See *id.* at 775.

DISCUSSION

The Certificate of Service filed by Plaintiff attests to the Summons and Complaint having been served on Paul Echols, as the managing or general agent of IRM Corporation. Dckt. 6. The California Secretary of State reports that the corporate powers of IRM Corporation have been suspended. <http://kepler.sos.ca.gov>. It also discloses that the agent for service of process for IRM Corporation is an individual named John Connolly, whose address is listed as 2151 Salvio St, Ste 325, Concord, California 94520. FN.1.

FN.1. The Secretary of State's information is consistent with that reported on the LEXIS-NEXIS research data base. The information reported thereunder indicates that the corporate powers were suspended March 1, 2014.

The California State Bar website reports that a Paul Echols is an attorney licensed to practice law in the State of California. The address at which Plaintiff states to have served Mr. Echols as the managing or general agent of IRM Corporation is the same address as listed by the California State Bar for Paul Echols.

On Schedule F Debtors list IRM Corporation as having a general unsecured claim for which a judgment was entered in 1993. Paul Echols, at the Modesto address, is listed as an additional notice person for the IRM Corporation judgment. If entered in 1993, such judgment would now be more than 20 years old.

At the hearing, -----

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Entry of Default filed by the Sherri Hertzic-Wojtowicz having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that xxxxx

6.	<u>14-90473</u> -E-7 ROBERT WOJTOWICZ AND <u>14-9023</u> SHERRI HERTZIC-WOJTOWICZ HERTZIC-WOJTOWICZ V. IRM CORPORATION	CONTINUED STATUS CONFERENCE RE: COMPLAINT 7-11-14 [<u>1</u>]
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Plaintiff's Atty: Shane Reich
Defendant's Atty: unknown

Adv. Filed: 7/11/14
Answer: none

Nature of Action:
Recovery of money/property

The Status Conference is xxxxxxxxxxxxxxxxxxxxxxx.
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No
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Continued from 12/18/14 to be heard in conjunction with Motion for Entry of Default.