

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

TIMOTHY PETER BAKER)
Plaintiff,)
v.) CIVIL ACTION NO. 09-0036-CG-C
JANET NAPOLITANO, SECRETARY)
OF HOMELAND SECURITY,)
Defendant.)

ORDER

This matter is before the court on plaintiff's motion for summary judgment. (Doc. 21).

Plaintiff asserts that defendant has failed to file an answer and, therefore, that summary judgment should be entered against the defendant. Plaintiff's motion is essentially a motion for judgment based on defendant's default. Federal Rule of Civil Procedure 55 provides for the entry of default when a party has failed to plead or otherwise defend. Defendant has not answered plaintiff's complaint but has attempted to defend against it by filing a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. (Doc. 7). That motion is currently pending before Judge Cassady of this Court.

Although Rule 12(a) requires that in most cases the responsive pleading must be served within 20 days¹ after service of the pleading to which it responds, a party is not always required to "plead." FED. R. CIV. P. 12. The responding party may prevent entry of default if he

¹ The rule allows 60 days for a responsive pleading if the defendant is the United States or one of its employees.

“otherwise defend[s]” against the action. FED. R. CIV. P. 55. Specifically, the filing of a 12(b)(1) motion to dismiss for lack of jurisdiction may be sufficient action to preclude entry of default.

See Abdullah v. City of Jacksonville, 242 Fed. Appx. 661, 663 (11th Cir. 2007)(the filing of a motion to dismiss and motion for summary judgment constitutes defense of an action for purposes of Rule 12(a)). Given that defendant has filed a 12(b)(1) motion for lack of subject-matter jurisdiction and this motion remains pending, default under Rule 55 is improper. As such, plaintiff’s motion for summary judgment is premature.

CONCLUSION

For the reasons stated above, plaintiff’s motion for summary judgment (Doc. 21) is **DENIED**.

DONE and ORDERED this 18th day of May, 2009.

/s/ Callie V. S. Granade
CHIEF UNITED STATES DISTRICT JUDGE