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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Christian Dale Lowery,
Plaintiff,
vs.
Unknown Barcklay,
Defendant.

No. CV-12-1625-PHX-RCB (LOA)
**ORDER TO SHOW CAUSE
AND ORDER**

This action is before the Court on *pro se* Plaintiff’s two Motions for Default Judgment, one filed on April 24, 2013, and the other on June 3, 2013. (Docs. 15, 18) Also pending are Plaintiff’s Motion to Serve Notice and Motion for Status. (Docs. 16-17)

I. Background

Plaintiff, an incarcerated inmate in the Arizona State Prison Complex-Yuma (“Yuma”) in the custody of the Arizona Department of Corrections (“ADOC”), San Luis, Arizona, commenced this Section 1983 action on July 30, 2012. (Doc. 1) On September 6, 2012, the assigned District Judge screened the Complaint and ordered service upon Defendant Dr. Barcklay (“Defendant”) after dismissing the other two named defendants. (Doc. 3 at 5)

Plaintiff alleges an Eighth Amendment medical claim of deliberate indifference against Defendant under 42 U.S.C. § 1983. (Doc. 1 at 3) The Complaint asserts Defendant is employed as a “Health Care Provider, Doctor” with ADOC. (Doc. 1 at 2) Plaintiff contends that, on March 14, 2011, while working at the prison as a plumber, he injured his left middle knuckle. (*Id.*) Plaintiff claims that, after his initial treatment for the injury, he contacted Health Services

1 numerous times for further medical care. (*Id.*) Plaintiff contends Defendant waited until April
2 19, 2011 to notify Plaintiff she made a request for an “ortho” evaluation. (*Id.*) Plaintiff further
3 claims when he was seen professionally by an orthopedic surgeon on May 5, 2011, the surgeon
4 determined Plaintiff had severed a tendon and, because so much time had elapsed, the chance
5 for a successful surgery and recovery were greatly diminished. (*Id.*) The surgeon performed
6 surgery on Plaintiff’s injured hand on June 6, 2011. (*Id.*) Plaintiff alleges Defendant’s failure
7 to provide him with adequate and timely medical care for his injury caused him to suffer pain
8 and resulted in diminished use of his hand. (*Id.*)

9 The District Court’s docket reflects a Deputy United States Marshal personally served
10 Defendant with a Summons and Complaint on February 14, 2013. (Doc. 6) The docket further
11 reflects Defendant has neither filed an answer nor otherwise responded to the Complaint.
12 Federal Rule of Civil Procedure (“Fed.R.Civ.P.”) 12 provides, in pertinent part, that “[a]
13 defendant must serve an answer . . . within 21 days after being served with the summons and
14 complaint.” Rule 12(a)(1)(A)(i), Fed.R.Civ.P. On April 12, 2013, nearly two months after
15 service of process, Plaintiff submitted an Application for Entry of Default. (Doc. 11) Three
16 days later and pursuant to Rule 55(a), Fed.R.Civ.P., the Clerk of Court issued an Entry of
17 Default against Defendant “for failure to answer or otherwise plead.” (Doc. 12) Pursuant to
18 Rule 55(b)(2), Fed.R.Civ.P., a default damages hearing will be scheduled in the near future.
19 Absent a timely written response to this OSC by Defendant, the Arizona Attorney General’s
20 Office, or Defendant’s counsel and an equally timely Rule 55(c) motion filed, a default damages
21 hearing will be held before the undersigned Magistrate Judge and a report and recommendation
22 will be made to the assigned District Judge, addressing Plaintiff’s request for a default
23 judgment. *See TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696-97 (9th Cir. 2001).

24 **II. Motions for Default Judgment**

25 Pursuant to Rule 55(b), Fed.R.Civ.P., Plaintiff now seeks default judgment against
26 Defendant in the amounts of \$90,000.00 for compensatory damages, \$150,000.00 in punitive
27 damages, and \$350.00 for Plaintiff’s filing fee. (Docs. 15, 18)

1 Default judgments are governed by Rule 55 of the Federal Rules of Civil Procedure.
2 After a default has been entered by a clerk of court, the well-pleaded factual allegations of a
3 complaint are taken as true, except for those allegations relating to damages. *TeleVideo Sys.,*
4 *Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987); *Discovery Communications, Inc. v.*
5 *Animal Planet, Inc.*, 172 F.Supp.2d 1282, 1288 (C.D. Cal. 2001). Even if the entry of default
6 is appropriate, it may not be sufficient to entitle a plaintiff to a default judgment against a
7 defendant. A district court must decide “whether the unchallenged facts constitute a legitimate
8 cause of action” such that a default judgment should be entered. *Bixler v. Foster*, 596 F.3d 751,
9 762 (10th Cir. 2010) (quoting 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane,
10 *Federal Practice and Procedure* § 2688, at 63 (3d ed. 1998)); see also *Nishimatsu Constr. Co.*
11 *v. Houston Nat’l Bank*, 515 F.2d 1200, 1206-08 (5th Cir. 1975) (vacating district court’s entry
12 of default judgment because the pleadings were insufficient to support the judgment).

13 “As a general rule, default judgments are disfavored; cases should be decided upon their
14 merits whenever reasonably possible.” *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183,
15 1189 (9th Cir. 2009) (citation omitted); see also *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir.
16 1986) (same). “The district court’s decision whether to enter a default judgment is a
17 discretionary one.” *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The Ninth Circuit
18 Court of Appeals mandates that, in exercising its discretion to award a default judgment, a
19 district court consider the following factors :

- 20 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff’s substantive
21 claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action;
22 (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.

23 *Eitel*, 782 F.2d at 1471-72.

24 “A plaintiff’s burden in ‘proving up’ damages is relatively lenient.” *Philip Morris USA,*
25 *Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003). “[F]undamental fairness,
26 required by due process of law, limits the scope of relief . . . which is, undoubtedly, why Rule
27 54(c), Fed.R.Civ.P., proscribes that a default judgment must not differ in kind from, or exceed
28 in amount, what is demanded in the pleadings.” *Freemyer v. Kyrene Village II, LLC*, 2011 WL

1 42681, at *3 (D. Ariz. Jan. 6, 2011) (quoting Rule 54(c), Fed.R.Civ.P.) (internal quotation
2 marks omitted). “In applying this discretionary standard, default judgments are more often
3 granted than denied.” *Philip Morris USA*, 219 F.R.D. at 498 (quoting *PepsiCo, Inc. v. Triunfo-*
4 *Mex, Inc.*, 189 F.R.D. 431, 432 (C.D. Cal. 1999)).

5 If entry of default judgment is appropriate, it “[m]ust not differ in kind from, or exceed
6 in amount, what is demanded in the pleadings.” Fed. R. Civ. P. 54(c); *see also In re Ferrell*, 539
7 F.3d 1186, 1192-1193 (9th Cir. 2008) (attorneys’ fees and costs may be awarded by default
8 judgment only if the statutory basis for such an award is properly pled in the complaint.).
9 Because the Complaint requests non-liquidated monetary damages, doc. 1 at 7, a default
10 damages evidentiary hearing must be held, requiring Plaintiff to prove his damages allowed by
11 law. *See Liberty Media Holdings, LLC v. Vinigay.com*, 2011 WL 7430062, at *1 (D. Ariz. Dec.
12 28, 2011) (citing, *e.g.*, *Holtsinger v. Bridle*, 2007 WL 1080112, at *1 (E.D. Cal. 2007)
13 (“[W]hen a plaintiff’s damages are unliquidated (*i.e.*, [in]capable of ascertainment from definite
14 figures contained in documentary evidence or in detailed affidavits) or punitive, they require
15 ‘proving up’ through an evidentiary hearing or some other means.”) (citation omitted)).

16 **III. Discussion**

17 Even though the State of Arizona and ADOC are not parties in this action, they have
18 significant interests in it. The State’s interest is derived, in part, by statute. Arizona Revised
19 Statute (“A.R.S.”) § 41-621(P) (2004), provides:

20 **P.** The department of administration shall pay, on behalf of any state officer,
21 agent or employee, any damages, excluding punitive damages, for which the
22 officer, agent or employee becomes legally responsible if the acts or omissions
23 resulting in liability were within the officer’s, agents or employee’s course and
24 scope of employment. The department of administration may pay for all damages
however designated which the officer, agent or employee becomes legally
responsible for if the acts or omissions resulting in liability are determined by the
director of the department of administration to be within the person’s course and
scope of employment.

25 Plaintiff’s allegations against Defendant pertain to acts or omissions allegedly within the course
26 and scope of Defendant’s employment as an ADOC physician. Assuming the State had notice
27 of Plaintiff’s action, it may retain counsel for Defendant and fund a defense for her. *See A.R.S.*
28 § 41–621(A)(3); *Irvin v. Lexington Ins. Co.*, 2010 WL 3450986 (Az. Ct. App. Sept. 2, 2010).

1 Moreover, under Arizona law, the State or the Arizona Attorney General's Office may
2 elect to represent Defendant or retain private counsel for her. Pursuant to Arizona Revised
3 Statute § 41-192.02(A):

4 The attorney general in his discretion is authorized to represent an officer or
5 employee of this state against whom a civil action is brought in his individual
6 capacity until such time as it is established as a matter of law that the alleged
activity or events which form the basis of the complaint were not performed, or
not directed to be performed, within the scope or course of the officer's or
employee's duty or employment.

7 This statute authorizes the Attorney General's Office either to handle the defense of public
8 officials and employees sued in their individual capacities directly by attorneys from the
9 Attorney General's Office or to retain outside counsel, either from the professional services
10 budget or by an interagency agreement with the agency in question. *See Op. Atty. Gen. No.*
11 *R76-174, p. 93, 1976-77.* Most prison litigation against a State employee in the District Court
12 of Arizona is defended by lawyers employed with the Attorney General's Office in the
13 Department of Corrections Unit.

14 Even though Defendant has failed to answer or otherwise respond to the Complaint and
15 before ruling on the merits of Plaintiff's Motions for Default Judgment, the Court will first order
16 Defendant and the Arizona Attorney General's Office to show cause why a default judgment
17 should not be entered against Defendant. In light of the strong public policy in favor of
18 deciding cases on their merits, the general rule disfavoring default judgments, and the broad
19 discretion afforded to district courts in ruling on motions for default judgments, the Court finds
20 an order to show cause is appropriate here.

21 The Court will, therefore, order Defendant and the Arizona Attorney General's Office
22 to show cause on or before July 1, 2013 why default should not be entered against Defendant.
23 The Court will hold Plaintiff's two Motions for Default Judgment in abeyance pending any
24 response to this Order to Show Cause. Given the State's significant interest in this action and
25 the Arizona Attorney General's statutory authority and practice to represent defendant
26 employees in this type of action, the Court will direct the Clerk of Court to notify the Arizona
27 Attorney General's Office of this Order to Show Cause by mailing copies of this OSC as
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1 directed below.

2 **IV. Motion to Serve Notice and Motion for Status**

3 In his Motion to Serve Notice, doc. 16, Plaintiff explains that because he has not received
4 a copy of the Summons served on Defendant or a Notice of Appearance from counsel for
5 Defendant, he is unable to serve Defendant with the filings he has submitted to the Court. He
6 asks the Court to serve Plaintiff’s filings on Defendant along with any pertinent orders issued
7 by the Court.

8 Federal Rule of Civil Procedure 5(a)(2) provides, in pertinent part, that “[n]o service is
9 required on a party who is in default for failing to appear.” The Court, therefore, sees no need
10 to send copies of Plaintiff’s filings to Defendant given Defendant’s failure to appear in this
11 action or assume litigation responsibilities of a pro se party. *See Pliler v. Ford*, 542 U.S. 225,
12 231 (2004) (Federal “[j]udges have no obligation to act as counsel or paralegal to pro se
13 litigants. . . Requiring district courts to advise a *pro se* litigant . . . would undermine [federal]
14 judges’ role as impartial decisionmakers.”). The Motion to Serve Notice will be denied.¹

15 Lastly, Plaintiff has submitted a Motion for Status, inquiring about the status of his first
16 Motion for Default Judgment, and a Motion to Serve Notice. (Docs. 16-17) Because this Order
17 to Show Cause addresses both motions, the Motion for Status will be granted to the extent set
18 forth in this Order to Show Cause.

19 Based on the foregoing,

20 **IT IS ORDERED** that, on or before **Monday, July 1, 2013**, Defendant Barcklay and
21 the Arizona Attorney General’s Office show cause in writing why a default judgment should
22 not be entered against Defendant pursuant to Rule 55(b)(2), Fed.R.Civ.P.

23 **IT IS FURTHER ORDERED** that the Clerk of Court is kindly directed to mail a copy
24 of this Order to:

25 _____
26 ¹ The Court notes that it directed a copy of a previous Order to Show Cause, doc. 8 at 2,
27 to be mailed to the address at which Defendant was served with process, but that mailing was
28 returned as undeliverable. (Doc. 14) In light of the importance of the instant Order, the Court
will again require a copy to be mailed to Defendant.

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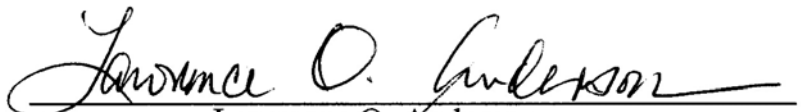
1) Defendant Barcklay at the address provided by Plaintiff on the service packet;

2) Mr. Michael Gottfried, Unit Chief, Department of Corrections Unit, Liability Management Section, Office of the Arizona Attorney General, 1275 West Washington Street, Phoenix, Arizona 85007-2926, via certified mail, return receipt requested; and,

3) Mr. Terrence E. Harrison, Chief Counsel of the Liability Management Section, Office of the Attorney General, 1275 West Washington Street, Phoenix, Arizona 85007-2926, via certified mail, return receipt requested.

IT IS FURTHER ORDERED that Plaintiff's Motion to Serve Notice, doc. 16, is **DENIED**. Plaintiff's Motion for Status, doc. 17, is **GRANTED** to the extent set forth in this Order. Plaintiff's two Motions for Default Judgment, docs. 15, 18, are **HELD IN ABEYANCE** pending a response to this Order to Show Cause. Plaintiff may reply to any response to any Order to Show Cause within seven days of receipt thereof.

Dated this 12th day of June, 2013.


Lawrence O. Anderson
United States Magistrate Judge