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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THOMAS GOOLSBY,

Plaintiff,

vs.

FERNANDO GONZALES, et al.,

Defendants.

1:11-cv-00394-LJO-GSA-PC

FINDINGS AND RECOMMENDATION,
RECOMMENDING THAT PLAINTIFF’S
MOTION FOR DEFAULT JUDGMENT
AGAINST DEFENDANT STEADMAN BE
DENIED, WITH PREJUDICE
(Doc. 30.)

OBJECTIONS, IF ANY, DUE WITHIN
THIRTY DAYS

I. BACKGROUND

Thomas Goolsby (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis with this civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on March 8, 2011. (Doc. 1.) This case now proceeds on Plaintiff’s First Amended Complaint, filed on September 17, 2012, against defendant T. Steadman for retaliation in violation of the First Amendment.¹ (Doc. 13.)

On April 23, 2014, Plaintiff filed a motion for default judgment against defendant Steadman (“Defendant”). (Doc. 32.)

¹ On April 22, 2013, the court dismissed all remaining claims and defendants from this action based on Plaintiff’s failure to state a claim. (Doc. 17.)

1 **II. ENTRY OF DEFAULT AND DEFAULT JUDGMENT**

2 Entry of default is appropriate as to any party against whom a judgment for affirmative
3 relief is sought that has failed to plead or otherwise defend as provided by the Federal Rules of
4 Civil Procedure and where that failure is shown by affidavit or otherwise. See Fed. R. Civ. P.
5 55(a). Rule 12 of the Federal Rules of Civil Procedure provides, “[A] defendant must serve an
6 answer within 21 days after being served with the summons and complaint; or if it has timely
7 waived service under Rule 4(d), within 60 days after the request for a waiver was sent.” Fed.
8 R. Civ. P. 12(a)(1)(A). Under Rule 4(d), a defendant may waive service of a summons by
9 signing and returning a waiver of service. Fed. R. Civ. P. 4(d). If a defendant fails to plead or
10 otherwise defend an action after being properly served with a summons and complaint, default
11 may be entered pursuant to Rule 55(a) of the Federal Rules of Civil Procedure.

12 **III. DISCUSSION**

13 Plaintiff argues that Defendant Steadman failed to file a timely response to the
14 complaint, in violation of Rules 55 and 12(a) of the Federal Rules of Civil Procedure. Plaintiff
15 argues that on March 13, 2014, the court granted Defendant a thirty-day extension of time in
16 which to file a response, and by April 20, 2014, Defendant had not filed an Answer or any
17 other pleading.

18 The record in this action shows otherwise. On March 17, 2014, the court issued an
19 order granting Defendant thirty days from the date of service of the order in which to file a
20 response to the complaint. (Doc. 30.) On April 17, 2014, Defendant filed a motion to declare
21 Plaintiff a vexatious litigant and require payment of security before the case may proceed.
22 (Doc. 31.) Defendant’s motion of April 17, 2014 was a timely response to the complaint.
23 Based on this record, there is no evidence that Defendant failed to plead or otherwise defend
24 against the complaint, and Plaintiff is not entitled to default judgment against Defendant on this
25 ground. The fact that Defendant has not filed an Answer in this action does not entitle Plaintiff
26 to entry of default or default judgment. As discussed above at ¶II, default may be entered
27 under Rule 55 if a defendant “fails to plead *or otherwise defend.*” Fed. R. Civ. P. 55 (emphasis
28 added). The filing of a motion to declare Plaintiff a vexatious litigant and require payment of

1 security before the case may proceed is evidence that Defendant has defended in this action,
2 precluding entry of default and default judgment under Rule 55. Thus, based on this record,
3 there is no evidence that Defendant failed to plead or otherwise defend against the complaint,
4 and Plaintiff is not entitled to default judgment against Defendant on this ground. Therefore,
5 Plaintiff's motion shall be denied, with prejudice.

6 **IV. CONCLUSION AND RECOMMENDATION**

7 Based on the foregoing, **IT IS HEREBY RECOMMENDED** that Plaintiff's motion
8 for default judgment against Defendant Steadman, filed on April 23, 2014, be DENIED with
9 prejudice.

10 These Findings and Recommendation will be submitted to the United States District
11 Court Judge assigned to this action pursuant to the provisions of 28 U.S.C. § 636 (b)(1).
12 Within **thirty (30) days** after being served with a copy of these Findings and
13 Recommendations, any party may file written objections with the Court and serve a copy on all
14 parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and
15 Recommendation." Any reply to the objections shall be served and filed within thirty (30) days
16 after service of the objections. The parties are advised that failure to file objections within the
17 specified time may waive the right to appeal the order of the District Court. Martinez v. Ylst,
18 951 F.2d 1153 (9th Cir. 1991).

19
20 IT IS SO ORDERED.

21 Dated: April 24, 2014

22 /s/ Gary S. Austin
23 UNITED STATES MAGISTRATE JUDGE
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