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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHNNY C. THOMAS,
Plaintiff,
v.
MARK KUO,
Defendants.

Case No. 1:16-cv-00524-EPG (PC)
ORDER DISCHARGING ORDER TO
SHOW CAUSE
(ECF No. 29)
ORDER DENYING ENTRY OF DEFAULT
(ECF No. 36)

Johnny C. Thomas (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. This case is proceeding on Plaintiff’s claim against Defendant Kuo for deliberate indifference to serious medical needs in violation of the Eighth Amendment.

Defendant Kuo executed a waiver of service of summons. (ECF No. 28). However, he has failed to file a responsive pleading within the time period laid out in the waiver, July 17, 2017. (*Id.*).

On August 10, 2017, the Court ordered Plaintiff to show cause why this case should not be dismissed for failure to prosecute based on his failure to move for entry of default under Rule 55(a) of the Federal Rules of Civil Procedure. (ECF No. 29).

On August 14, 2017, Defendant Kuo appeared and filed an answer to Plaintiff’s complaint. (ECF No. 30). The Court entered a scheduling and discovery order on August 16,

1 2017 requiring the parties to make initial disclosures and setting a scheduling conference for
2 November 20, 2017. (ECF No. 34).

3 On August 21, 2017, Plaintiff filed a motion requesting a “judgment for default.” (ECF
4 No. 36). Defendant Kuo filed a response in opposition on August 24, 2017 arguing that
5 Plaintiff’s motion should be denied because entry of default under Rule 55(a) is inappropriate.
6 (ECF No. 37). Defendant Kuo states that he has filed his answer and this case is proceeding to
7 the next phase so Plaintiff’s motion is moot at this time. (Id.)

8 Because entry of default is a prerequisite to a default judgment, see Fed. R. Civ. P. 55,
9 the Court construes Plaintiff’s motion as a motion for entry of default under Rule 55(a). Entry
10 of default is appropriate when “party against whom a judgment for affirmative relief is sought
11 has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise.”
12 Fed. R. Civ. P. 55(a). The Court agrees that Defendant Kuo has appeared, albeit it late,¹ and
13 has expressed an intention to defend the case. The Court notes that Defendant Kuo failed to
14 answer as required under the rules and reminds Defendant Kuo of the importance of complying
15 with such deadlines in the future. Nevertheless, in light of the late answer, entry of default is
16 inappropriate.

17 Accordingly, based on the foregoing, it is HEREBY ORDERED that:

- 18 1. The August 10, 2017 order to show cause (ECF No. 29) is DISCHARGED; and
19 2. Plaintiff’s motion for entry of default (ECF No. 36) is DENIED.

20 IT IS SO ORDERED.
21

22 Dated: August 29, 2017

23 /s/ Eric P. Gray
24 UNITED STATES MAGISTRATE JUDGE

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26
27 ¹ The Court notes that the appropriate procedure when a defendant is appearing after the date that its
28 responsive pleading is due is to file a motion for extension of time pursuant to Rule 6(b)(1)(B) of the Federal
Rules of Civil Procedure. That did not occur here.