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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DONNA L. MURRAY
Plaintiff,
v.
PRUDENTIAL INSURANCE
COMPANY OF AMERICA,
Defendant.

No. 2:09-cv-03480-MCE-JFM

ORDER

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The Court is in receipt of Plaintiff's Objections to the Pretrial Scheduling Order ("PTSO") in this matter, filed April 6, 2010. Plaintiff objects to that portion of the PTSO scheduling the instant matter for a bench, as opposed to jury, trial.

Plaintiff's objections are overruled. It is undisputed that Defendant answered Plaintiff's Complaint on December 15, 2009, two days before it removed the lawsuit to this Court from the Yolo County Superior Court on grounds of diversity of citizenship pursuant to 28 U.S.C. §§ 1332(a) and 1441(b).

///

1 Because no jury trial was demanded while the matter was pending
2 in state court, under Federal Rule of Civil Procedure
3 81(c)(3)(B),¹ Plaintiff had fourteen (14) days after December 17,
4 2009 to file a timely demand. She did not do so within that
5 period; in fact, no demand for jury trial was made until
6 February 16, 2010 when the parties submitted their Joint Status
7 Report. By that time, Plaintiff's demand was some six weeks
8 late.

9 Although Rule 81(c) recognizes an exception to the
10 requirement that an express demand be made if state law does not
11 mandate such demand, the Ninth Circuit has held that because
12 California is a state where an express demand is required, the
13 exception in Rule 83(c) does not apply to cases removed from a
14 California court. See Lewis v. Time Inc., 710 F.2d 549, 556 (9th
15 Cir. 1983); Mastec North America, Inc. v. Comcast Cable, 2009 WL
16 1690519 at *1 (N.D. Cal. 2009). Lewis remains the controlling
17 law on this issue, despite intervening changes to California Code
18 of Civil Procedure § 631 permitting a plaintiff to make an
19 express demand for jury trial up until the time of trial.
20 Mastec, 2009 WL 1690519 at *2; see also Wave House Belmont Park,
21 LLC v. Travelers Property Casualty Co., 244 F.R.D. 608, 610-12
22 (S.D. Cal. 2007). Significantly, both Mastec and Wave House are
23 factually analogous to the present matter inasmuch as in both
24 cases, the defendant answered either at or prior to the time
25 removal was effectuated, and in both cases a jury trial was not
26 sought within the time parameters set forth in Rule 81(d).

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28 ¹ All further references to "Rule" or "Rules" are to the
Federal Rules of Civil Procedure unless otherwise noted.

1 Just as the tardily filed demand for jury trial were deemed
2 untimely in those cases, is also untimely here.

3 In the absence of a proper demand for jury trial, then,
4 Plaintiff's Objections to the PTSO (Docket No. 7) are overruled.
5 While Plaintiff's objections do reference the ability of the
6 Court to nonetheless order trial by jury under Rule 39(b), no
7 motion to that effect has been made and the issue is not properly
8 before the Court at this time.

9 IT IS SO ORDERED.

10 Dated: April 13, 2010

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13 MORRISON C. ENGLAND, JR.
14 UNITED STATES DISTRICT JUDGE
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