

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH EDWARD MARTY,

Plaintiff,

No. 2:10-cv-01823 KJM¹ KJN PS

v.

LOUIS B. GREEN, et al.,

Defendants.

ORDER

Presently before the court is plaintiff's motion for default judgment.² (Dkt. No. 14.) The court heard this matter on its law and motion calendar on January 27, 2011.³ (Dkt. No. 22.) Plaintiff Joseph Edward Marty, who is proceeding without counsel, appeared on his

¹ On January 20, 2011, United States District Judge Kimberly J. Mueller was assigned as the district judge presiding over this case. (See Order of Reassignment, Jan. 20, 2011, Dkt. No. 21.)

² This action proceeds before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

³ A Status (Pretrial Scheduling) Conference was also set for January 27, 2011, and neither party filed a status report. As addressed below, and as plaintiff essentially conceded at the hearing, none of the defendants in this case has been properly served with process. Moreover, a motion to dismiss on grounds including insufficient service of process is set for hearing on February 10, 2011. Because there are service-related problems in this case and a pending motion to dismiss the entire action, the undersigned will not at this time enter a status (pretrial scheduling) order, but if necessary will hold an additional status conference at a later date and enter a scheduling order.

1 own behalf.⁴ Attorney Andrew T. Caulfield appeared on behalf of the following 18 defendants:
2 Louis B. Green, Edward L. Knapp, Joan Barbee, Becky Nelson, Melinda Iremonger, Mark
3 Contois (erroneously sued as “Mark Tontois”), Angela Wilson, Janet Walker Conroy, Tim
4 William, Robert J. Barbot, Beth McCourt, Vern R. Pierson, Worth Dikeman, John R. Knight,
5 Ray Nutting, James R. Sweeney, Ron Briggs, and Norman Santiago (collectively, the “Opposing
6 Defendants”).⁵

7 The undersigned has considered the briefs, oral arguments, and the appropriate
8 portions of the record in this case and, for the reasons stated below, denies plaintiff’s motion for
9 default judgment. There are several procedural and substantive problems with plaintiff’s motion.
10 However, briefly stated, plaintiff failed to first seek a clerk’s entry of default, which is required
11 before a plaintiff may move for a default judgment. More significantly, plaintiff has not
12 demonstrated that he properly served any of the Opposing Defendants. Accordingly, even if
13 plaintiff had sought a clerk’s entry of default, it would have been denied for want of proper
14 service of process.

15 I. BACKGROUND

16 The substantive allegations in the operative complaint are not relevant to the
17 disposition of this motion. Accordingly, those allegations are not recounted here in detail.

18 ⁴ At the hearing, Mr. Marty clarified that it is his belief or preference that his given name is
19 properly spelled “Joseph-Edward: Marty.” He further indicated that this spelling was “filed with the
20 Supreme Court,” although the import of that representation is unclear. If Mr. Marty desires to
21 include an alternate spelling of his name in the caption of this case, the court will entertain a request
22 to add that spelling of Mr. Marty’s name to the caption. The court notes that the caption used by this
23 court reflects the spelling provided by Mr. Marty in the majority of documents that he previously
24 filed with the court, including the original complaint and amended complaint. (See Dkt. Nos. 1, 3,
25 7, 9, 11.) It was not until Mr. Marty filed the pending motion for default judgment that he began
26 using a spelling of his name that includes a hyphen and colon. In any event, the court will entertain
a separate request by Mr. Marty to add his preferred spelling to the caption as an alternative spelling.

⁵ At the hearing, Mr. Caulfield indicated that he was “specially” appearing on behalf of the
Opposing Defendants. Insofar as possible waivers of jurisdictional challenges is concerned, the
distinction between special and general appearances has been abolished in federal court. See SEC
v. Wencke, 783 F.2d 829, 832 n.3 (9th Cir. 1986); Wright v. Yackley, 459 F.2d 287, 291 (9th Cir.
1972).

1 On July 14, 2010, plaintiff filed an application for a temporary restraining order
2 (“TRO”), that United States District Judge Morrison E. England, Jr.⁶ denied on July 15, 2010.⁷
3 (Mot. for Emergency Inj., Dkt. No. 1; Order, July 15, 2010, Dkt. No. 6.) Noting that plaintiff’s
4 action seeks, among other things, damages of approximately \$500 billion dollars, Judge England
5 denied plaintiff’s application for a TRO and stated, in part, that “[t]he inherent implausibility of
6 the claims asserted by Marty makes it impossible for this Court to conclude there is any
7 likelihood [he] will ultimately prevail.” (Order, July 15, 2010, at 3.) Plaintiff subsequently filed
8 a “Response” to Judge England’s order denying plaintiff’s application for a TRO (Dkt. No. 7),
9 which Judge England denied to the extent that the “Response” constituted a motion for
10 reconsideration (Order, Aug. 13, 2010, Dkt. No 8).

11 On September 8, 2010, plaintiff filed a document entitled “Motion For Orders To
12 Void and Vacate: Judgments and Orders To Strike Liens of El Dorado County Superior Court,”
13 and noticed the “motion” for hearing on September 30, 2010. (Dkt. No. 9.) Because plaintiff’s
14 document was styled as a “motion” and was defectively noticed, the court ordered plaintiff to re-
15 notice the motion in compliance with this court’s Local Rule 230(b). (Minute Order, Sept. 13,
16 2010, Dkt. No. 10.) On October 5, 2010, plaintiff filed a document entitled “Amended Motion
17 For Orders To Void and Vacate: Judgments and Orders To Strike Liens of El Dorado County
18 Superior Court,” which he noticed for hearing on November 18, 2010 (the “Amended Motion”).
19 (Dkt. No. 11.)

20 Upon review of plaintiff’s Amended Motion, the undersigned concluded that
21 although styled as a “motion,” the Amended Motion was not in fact a motion; instead, the
22 Amended Motion appeared to be an amended complaint seeking relief relative to several
23 decisions of the California Superior Court for the County of El Dorado. (Order, Oct. 14, 2010,

24 ⁶ Judge England was the district judge previously assigned to this matter.

25 ⁷ The court’s docket reflects that none of the named defendants made an appearance in
26 response to plaintiff’s application for a TRO.

1 Dkt. No. 12.) Accordingly, the undersigned construed the Amended Motion as a first amended
2 complaint. (Id. at 2 (“Plaintiff’s ‘Amended Motion For Orders To Void and Vacate: Judgments
3 and Orders To Strike Liens of El Dorado County Superior Court’ (Dkt. No. 11) is hereby deemed
4 to constitute a ‘First Amended Complaint.’”).) The undersigned refers to the Amended Motion
5 as the First Amended Complaint in the remainder of this order.

6 On October 14, 2010, the court issued a summons requiring defendants to respond
7 to plaintiff’s First Amended Complaint within 21 days of being served with the summons and the
8 First Amended Complaint. (See Dkt. No. 13.) The “Proof of Service” appended to plaintiff’s
9 First Amended Complaint indicates that plaintiff served the First Amended Complaint only by
10 U.S. Mail on:

11 CAULFIELD, DAVIES & DONAHUE, LLP
12 Attn: Richard Caulfield
13 P.O. BOX 277010
14 Sacramento, CA 95827-7010

15 (Proof of Service, attached to First Am. Compl., Dkt. No. 11 at 37-39; see also Mot. for Default
16 J., Ex. A.) Caulfield, Davies & Donahue, LLP is not a named defendant. The court’s docket
17 does not contain a subsequently filed proof of service or certificate of service reflecting that
18 plaintiff served the summons and First Amended Complaint on any defendants after the
19 summons issued.⁸

20 On December 6, 2010, plaintiff filed the pending motion for default judgment.
21 The court’s docket reveals plaintiff did not seek, and thus the Clerk of Court did not enter, a
22 clerk’s entry of default pursuant to Federal Rule of Civil Procedure 55(a) prior to the filing of the
23 motion for default judgment.

24 On January 4, 2011, the Opposing Defendants filed a written opposition to
25 plaintiff’s motion for default judgment, arguing, in part, that the Clerk of Court could not enter

26 ⁸ At the January 27, 2011 hearing, plaintiff conceded that he has not personally served the
named defendants with process.

1 default against the Opposing Defendants pursuant to Federal Rule of Civil Procedure 55(a)
2 because the Opposing Defendants had never been properly served in this action. (See Opp'n to
3 Mot. for Default J. ("Opp'n") at 2, Dkt, No. 18.) The Opposing Defendants further argue that the
4 Clerk of Court could not enter a default judgment against them pursuant to Federal Rule of Civil
5 Procedure 55(b)(1) because plaintiff's claim is not for a "sum certain or a sum that can be made
6 certain by computation." (Id. at 2-3.)

7 Also on January 4, 2011, the Opposing Defendants filed a motion to dismiss
8 plaintiff's First Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1),
9 12(b)(5), and 12(b)(6), which is scheduled for a hearing on February 10, 2011. (Mot. to Dismiss,
10 Dkt. No. 19; Minute Order, Jan. 6, 2011, Dkt. No. 20.) The Opposing Defendants' motion to
11 dismiss more thoroughly addresses the Opposing Defendants' argument that none of them was
12 properly served in this action. (Opposing Defs.' Memo. of P. & A. in Supp. of Mot. to Dismiss
13 at 7-9, Dkt. No. 19, Doc. No. 19-3.) The Opposing Defendants attempt to incorporate their
14 motion to dismiss into their opposition to the motion for default judgment and request that the
15 court consider the motion to dismiss and supporting papers in analyzing plaintiff's motion for
16 default judgment. (Opp'n at 2.) Although this sort of incorporation by reference is not an ideal
17 practice, the undersigned has considered the motion to dismiss, which was filed the same day as
18 the opposition to the motion for default judgment.

19 II. DISCUSSION

20 The Opposing Defendants' opposition to plaintiff's motion for default judgment is
21 well-taken for the reasons that follow. Accordingly, the undersigned denies plaintiff's motion for
22 default judgment.

23 A. Plaintiff Failed To Seek A Clerk's Entry of Default

24 Plaintiff's motion for default judgment is denied because plaintiff did not follow
25 the procedural steps required to properly file a motion for default judgment. Specifically,
26 plaintiff failed to seek a clerk's entry of default from the Clerk of Court prior to filing his motion

1 for default judgment.

2 Federal Rule of Civil Procedure 55 governs the entry of default by the clerk and
3 the subsequent entry of default judgment by either the clerk or the district court. In relevant part,
4 Rule 55 provides:

5 **(a) Entering a Default.** When a party against whom a judgment for
6 affirmative relief is sought has failed to plead or otherwise defend, and
7 that failure is shown by affidavit or otherwise, the clerk must enter the
8 party's default.

9 **(b) Entering a Default Judgment.**

10 **(1) By the Clerk.** If the plaintiff's claim is for a sum certain or a sum that
11 can be made certain by computation, the clerk--on the plaintiff's request,
12 with an affidavit showing the amount due--must enter judgment for that
13 amount and costs against a defendant who has been defaulted for not
14 appearing and who is neither a minor nor an incompetent person.

15 **(2) By the Court.** In all other cases, the party must apply to the court for a
16 default judgment. . . .

17 Fed. R. Civ. P. 55(a)-(b). As the Ninth Circuit Court of Appeals has stated, Rule 55 requires a
18 "two-step process" consisting of: (1) seeking a clerk's entry of default, and (2) filing a motion for
19 the entry of default judgment. See Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir. 1986) ("Eitel
20 apparently fails to understand the two-step process required by Rule 55."); accord Symantec
21 Corp. v. Global Impact, Inc., 559 F.3d 922, 923 (9th Cir. 2009) (noting that Rules 55(a) and (b)
22 provide a two-step process for obtaining a default judgment); see also Norman v. Small, No.
23 09cv2235 WQH , 2010 WL 5173683, at *2 (S.D. Cal. Dec. 14, 2010) (unpublished) (denying
24 plaintiff's motion for default judgment because the clerk had not yet entered a default); Cramer v.
25 Target Corp., No. 1:08-cv-01693-OWW-SKO, 2010 WL 2898996, at *1 (E.D. Cal. July 22,
26 2010) (unpublished) ("Obtaining a default judgment in federal court is a two-step process that
includes: (1) entry of default and (2) default judgment."); Bach v. Mason, 190 F.R.D. 567, 574
(D. Idaho 1999) ("Plaintiffs have improperly asked this court to enter a default judgment without
first obtaining an entry of default by the clerk. Since plaintiffs' motion for entry of default
judgment is improper, it is denied."), aff'd, 3 Fed. Appx. 656 (9th Cir. 2001), cert. denied, 534

1 U.S. 1083 (2002).

2 Here, plaintiff did not request or obtain a clerk's entry of default from the Clerk of
3 Court upon a showing by affidavit or otherwise that defendants failed to plead or otherwise
4 defend themselves. Accordingly, plaintiff's motion for default judgment is not properly before
5 the undersigned and is denied.

6 B. Plaintiff Did Not Properly Serve Defendants

7 Had plaintiff attempted to seek a clerk's entry of default prior to filing the pending
8 motion, the Clerk of Court would have denied the request because plaintiff has not shown by
9 affidavit or otherwise that defendants failed to appear after being properly served with process
10 under the Federal Rules of Civil Procedure. As the Opposing Defendants point out, any defects
11 in service of process render a default judgment subject to attack through a motion to set aside the
12 default. See Mason v. Genisco Tech. Corp., 960 F.2d 849, 851 (9th Cir. 1992) (holding that if
13 service of process on a party in an earlier action against whom a default judgment was entered
14 was not proper, then the default judgment in the earlier action was void and had no preclusive
15 effect in the present action); see, c.f., Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986) ("A
16 failure to make a timely answer *to a properly served complaint* will justify the entry of a default
17 judgment" (emphasis added).), cert. denied, 484 U.S. 870 (1987).

18 As a general matter, Federal Rule of Civil Procedure 5 governs the manner of
19 service of a pleading filed after the original complaint, see Fed. R. Civ. P. 5(a)(1)(B); Employee
20 Painters' Trust v. Ethan Enters., Inc., 480 F.3d 993, 999 (9th Cir. 2007), and would permit the
21 service of an amended pleading on counsel via U.S. Mail.⁹ See Fed. R. Civ. P. 5(b)(1),

22 _____
23 ⁹ There are certain circumstances under which a plaintiff must nevertheless serve an
24 amended pleading on a defendant in accordance with Rule 4. See Fed. R. Civ. P. 5(a)(2) ("No
25 service is required on a party who is in default for failing to appear. But a pleading that asserts a new
26 claim for relief against such a party must be served on that party under Rule 4."); Employee Painters'
Trust, 480 F.3d at 999 ("An amended complaint need only be served in the manner provided by Rule
4 when (1) a party is 'in default for failure to appear' and (2) the 'pleadings assert[] new or
additional claims for relief.' Fed. R. Civ. P. 5(a)."). The Opposing Defendants have not asserted

1 5(b)(2)(C). However, this case presents a peculiar set of circumstances in that: (1) there is no
2 evidence in the record that suggests that plaintiff served any defendant with the summons and
3 original complaint, (2) no defendant appeared in response to plaintiff's application for a TRO,
4 and (3) the court was required to construe an "amended motion" filed by plaintiff as a First
5 Amended Complaint. Under these circumstances, Rule 4 provides a more appropriate means of
6 measuring the adequacy of service of process.

7 Here, plaintiff did not serve process consistent with Federal Rule of Civil
8 Procedure 4. At a minimum, nothing in the record suggests that plaintiff served a summons on
9 any defendant along with either the original complaint or First Amended Complaint. See Fed. R.
10 Civ. P. 4(c)(1) ("A summons must be served with a copy of the complaint"). For this reason
11 alone, service of process was not proper and any request for the entry of default or a default
12 judgment fails for want of proper service. Moreover, although the undersigned does not
13 elaborate on the point here, plaintiff has failed to show service of process on the Opposing
14 Defendants in accordance with Federal Rule of Civil Procedure 4(e).¹⁰

15 Even if analyzed under Federal Rule of Civil Procedure 5, plaintiff failed to
16 properly serve the First Amended Complaint.¹¹ Rule 5(b)(2) provides that service of an amended
17 pleading may be effectuated by mailing the amended pleading to "the person's last known
18 address." Fed. R. Civ. P. 5(b)(2). Moreover, "if a party is represented by an attorney, service
19 under this rule must be made on the attorney unless the court orders service on the party." Fed.

20 _____
21 that they fall within this rule.

22 ¹⁰ Plaintiff has not demonstrated that he effectuated service of process under Rule 4(e)(2)
23 by: "(A) delivering a copy of the summons and of the complaint to the individual personally; (B)
24 leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable
25 age and discretion who resides there; or (C) delivering a copy of each to an agent authorized by
26 appointment or by law to receive service of process." Fed. R. Civ. P. 4(e)(2). Moreover, plaintiff
has not demonstrated that he effectuated service of process in accordance with California law. See
Fed. R. Civ. P. 4(e)(1).

¹¹ The undersigned reiterates that Rule 5 does not provide the appropriate rule regarding
service under the particular facts of this case.

1 R. Civ. P. 5(b)(1).

2 Here, plaintiff served an attorney who only recently appeared on behalf of the
3 Opposing Defendants in state court proceedings, but a declaration submitted by that attorney,
4 Andrew T. Caulfield, reflects that he was not designated or authorized to receive service of
5 process by the Opposing Defendants in this federal action. (See Andrew T. Caulfield Decl. In
6 Supp. of Mot. to Dismiss (“Caulfield Decl.”) ¶ 3, Dkt. No. 19, Doc. No. 19-2.) Plaintiff’s Proof
7 of Service states that the First Amended Complaint was served “on interested parties in this
8 action” via U.S. Mail.¹² (Proof of Serv., attached to First Am. Compl., Dkt. No. 11 at 37-39; see
9 also Mot. for Default J., Ex. A.) However, the “Service List” that follows only lists the law firm
10 of Caulfield, Davies & Donahue, LLP as having been served by mail. Caulfield, Davies &
11 Donahue, LLP is not a named defendant in this action. And although the County of El Dorado
12 had retained attorney Andrew Caulfield and Caulfield, Davies & Donahue, LLP to represent 18
13 defendants who are or were employees of the County of El Dorado in 18 separate proceedings in
14 state court, the Caulfield Declaration represents under penalty of perjury that no attorney at
15 Caulfield, Davies & Donahue, LLP has been designated to accept service of process on behalf of
16 any of the Opposing Defendants or the County of El Dorado in the action proceeding in federal
17 court. (Caulfield Decl. ¶¶ 2-3.) Moreover, attorneys Andrew Caulfield and Richard Caulfield
18 and their staff at Caulfield, Davies & Donahue, LLP have not been personally served with any
19 documents related to this action. (Id. ¶ 4.) Finally, the Caulfield Declaration represents that
20 plaintiff did not contact Andrew or Richard Caulfield to determine whether either attorney would
21 accept service of process on behalf of the Opposing Defendants. (Id. ¶ 6.) Under these
22 circumstances, the undersigned concludes that service of process was not proper even if analyzed
23 under Rule 5.

24 Plaintiff has not demonstrated proper service of process on the defendants named

25 ¹² The name of the person who purportedly served the First Amended Complaint by mail is
26 illegible on the proof of service.

1 in this action, including the Opposing Defendants. Accordingly, plaintiff's motion for default
2 judgment is denied for this additional reason.

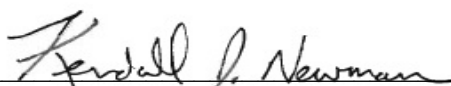
3 III. CONCLUSION

4 For the reasons stated above, IT IS HEREBY ORDERED that plaintiff's motion
5 for default judgment is denied.

6 IT IS SO ORDERED.

7 DATED: January 27, 2011

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE