

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
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, and
THE STATE OF CALIFORNIA ex rel.,
NANCY A. SMITH, and WENDY S.
JOHNSON,

No. 2:12-cv-1783 GEB DB

ORDER

Relators,

v.

NEIL ALAN VAN DYCK, DPM, et al.,

Defendants.

This matter is before the undersigned on relators’ December 5, 2016 amended motion for reconsideration of the Clerk of the Court’s September 15, 2016 decision to decline the entry of default as to defendant Neil Alan Van Dyck, DPM, Inc., (hereinafter “corporate defendant”). (ECF No. 74.) Defendant Neil Alan Van Dyck, an individual, filed an opposition on January 6, 2017. (ECF No. 75.) Relators filed a reply on January 13, 2017. (ECF No. 81.)

On April 6, 2016, relators filed an executed waiver of summons on behalf of both the individual and corporate defendant. (ECF No. 61.) “When the plaintiff files a waiver, proof of service is not required and these rules [the Federal Rules of Civil Procedure] apply as if a summons and complaint had been served at the time of filing the waiver.” Fed. R. Civ. P 4(d)(4).

///

1 The waiver reflected that defendants were represented by attorney Andrew B. Goodman.

2 On April 25, 2016, relators filed a second amended complaint, (ECF No. 62), and served
3 the second amended complaint on defendants' attorney, Andrew Goodman. (ECF No. 63.) Rule
4 5 provides that, "[i]f a party is represented by an attorney, service under this rule must be made
5 on the attorney unless the court orders service on the party." Although the individual defendant
6 filed an answer to the second amended complaint, the corporate defendant has failed to respond to
7 the second amended complaint in any respect.


8 "Under Rule 55(a) of the Federal Rules of Civil Procedure, '[w]hen a party against whom
9 a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . , the clerk
10 must enter the party's default.' The entry of default is therefore not discretionary." Bricklayers
11 and Allied Craftworkers Local 2, Albany, N.Y. Pension Fund v. Moulton Masonry & Const.,
12 LLC, 779 F.3d 182, 186 (2nd Cir. 2015) (quoting Fed. R. 55(a)).

13 Accordingly, upon consideration of the arguments on file, IT IS HEREBY ORDERED
14 that:

15 1) Relators' December 5, 2016 amended motion for reconsideration (ECF No. 74) is
16 granted; and

17 2) The Clerk of the Court is directed to enter the default of defendant Neil Alan Van
18 Dyck, DPM, Inc.

19 Dated: January 20, 2017

20
21
22 
DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

23 DLB:6
DB\orders\orders.civil\smith1783.mot.recon.ord

24
25
26
27
28