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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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)	
NORTHERN CALIFORNIA GLAZIERS,)	No. 08-4487 SC
ARCHITECTURAL METAL AND GLASS)	
WORKERS PENSION PLAN, et al.)	
)	ORDER GRANTING IN
Plaintiffs,)	PART AND DENYING IN
)	PART PLAINTIFFS'
v.)	MOTION FOR DEFAULT
)	<u>JUDGMENT</u>
KENNETH MICHAEL WOLTER,)	
Individually and dba DESIGN TECHS)	
(aka DESIGN TECH, aka DESIGN)	
TECHNOLOGIES),)	
)	
Defendant.)	
)	
_____)	

I. INTRODUCTION

Before the Court is the Motion for Default Judgment ("Motion") submitted by Plaintiffs Northern California Glaziers, Architectural Metal and Glass Works Pension Plan, et al., ("Plaintiffs"). Docket No. 11. Defendant Kenneth Wolter ("Wolter") was duly notified of these proceedings, but has not participated. See Summons Returned Executed, Docket No. 4. An Entry of Default as to Wolter has been filed. Docket No. 6. The Court previously denied Plaintiffs' Motion, after it became evident that Wolter had previously filed a petition for bankruptcy. Docket No. 15. The Court ordered Plaintiffs to

1 submit a brief explaining why the suit should not be dismissed,
2 id., and the Plaintiffs have submitted a Response, Docket No. 17.

3 The Court concludes that the suit should not be dismissed.
4 For the reasons stated herein, the Court GRANTS IN PART AND DENIES
5 IN PART Plaintiffs' Motion, orders Wolter to submit to an audit by
6 Plaintiffs' auditors, and AWARDS Plaintiffs attorneys' fees and
7 costs in the amount of \$3443.66.

8
9 **II. BACKGROUND**

10 In 2005, Wolter entered into the Northern California Glaziers
11 Master Agreement ("Bargaining Agreement"). Compl., Docket No. 1,
12 ¶ 18. Plaintiffs contend that Wolter is bound by the Bargaining
13 Agreement and ERISA requirements to make payments to Plaintiffs.
14 Compl. ¶¶ 16-17. The amount must be determined according to the
15 hours worked by Wolter's employees. Id. ¶ 13. In January of
16 2008, Northern California Glaziers, Architectural Metal and
17 Glassworkers Health and Welfare Trust Fund merged into the
18 District Counsel 16 Northern California Health and Welfare Trust
19 Fund Agreement. Kaplan Decl. ¶ 4, Ex. 2 ("HWTFA").¹ Pursuant to
20 the terms of the HWTFA (and incorporated into the Bargaining
21 Agreement), Plaintiffs requested that this Court order Wolter to
22 submit to an audit to determine the amount that he owes. Mot. at
23 2; see HWTFA art. III § D.

24 Plaintiffs also note that Wolter had submitted a voluntary
25 petition for bankruptcy on August 23, 2005, but claim that his

26
27 ¹ Muriel Kaplan, counsel for Plaintiffs, submitted a
28 declaration in support of the Motion. Docket No. 12.

1 business continued until an unknown date, believed to be in 2007.
2 Compl. ¶ 18; see In re: Ken Wolter, No. 05-44731 (Bankr. N.D.
3 Cal.).² Wolter was discharged from bankruptcy on February 9,
4 2009. Order Discharging Debtor, Bankr. Docket No. 65. Plaintiffs
5 claim that they were not notified of the bankruptcy proceedings.
6 Resp. at 3.

7
8 **III. LEGAL STANDARD**

9 Pursuant to 11 U.S.C. § 1328, a debtor who completes payments
10 under a Chapter 13 plan is generally entitled to a discharge of
11 "all debts provided for by the plan or disallowed under section
12 502 of [the bankruptcy code]." "However, a claim cannot be
13 considered to have been provided for by the plan if a creditor
14 does not receive proper notice of the proceedings." In re
15 Hairopoulos, 118 F.3d 1240, 1244 (8th Cir. 1997).

16 After entry of default, the Court may enter a default
17 judgment. Fed. R. Civ. P. 55(b)(2). Its decision whether to do
18 so, while "discretionary," Aldabe v. Aldabe, 616 F.2d 1089, 1092
19 (9th Cir. 1980), is guided by several factors. First, the Court
20 must "assess the adequacy of the service of process on the party
21 against whom default is requested." Bd. of Trs. of the N. Cal.
22 Sheet Metal Workers v. Peters, No. C-00-0395, 2000 U.S. Dist.
23 LEXIS 19065, at *2 (N.D. Cal. Jan. 2, 2001). If the Court
24 determines that service was sufficient, it may consider the
25 following factors, if present, in its decision on the merits of a

26
27 ² Items from the bankruptcy docket in In re Wolter will be
28 cited as Bankr. Docket No. XX.

1 motion for default judgment:

2 (1) the possibility of prejudice to the plaintiff, (2)
3 the merits of plaintiff's substantive claim, (3) the
4 sufficiency of the complaint, (4) the sum of money at
5 stake in the action, (5) the possibility of a dispute
6 concerning material facts, (6) whether the default was
7 due to excusable neglect, and (7) the strong policy
8 underlying the Federal Rules of Civil Procedure favoring
9 decisions on the merits.

10 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). "The
11 general rule of law is that upon default the factual allegations
12 of the complaint, except those relating to the amount of damages,
13 will be taken as true. Geddes v. United Fin. Group, 559 F.2d 557,
14 560 (9th Cir. 1977). Therefore, for the purposes of this Motion,
15 the Court accepts as true the facts as alleged in the Complaint.

16 **IV. DISCUSSION**

17 **A. Whether Dismissal Is Appropriate**

18 Plaintiffs provide two reasons why the Court should not
19 dismiss this suit as foreclosed by Wolter's bankruptcy
20 proceedings. First, Plaintiffs state that because they are only
21 seeking to recover for the periods between August 24, 2005 (the
22 date after Wolter filed for bankruptcy) and the end of his
23 business, they are only attempting to collect on debts incurred
24 post-petition. Resp. at 2; Compl. ¶ 18. Plaintiffs do not
25 clearly allege when Wolter incurred this obligation. It appears
26 that he signed the Bargaining Agreement on January 13, 2005, and
27 again on August 25, 2005. See Kaplan Decl. ¶ 3, Ex. 1 ("Master
28 Agreement"). Plaintiffs do not explain the second signature, why
Wolter would reaffirm this obligation two days after filing for

1 bankruptcy, or what result this may have on his pre-petition
2 obligations. The Court notes that to the extent Wolter's
3 obligations were incurred prior to the bankruptcy petition, it
4 should have been resolved in bankruptcy, regardless of when
5 payment became due. See In re: Stewart Foods, Inc., 64 F.3d 141,
6 146 (4th Cir. 1995).

7 The Court need not resolve the question of when Wolter
8 incurred his obligations under the Bargaining Agreement, because
9 the Court agrees with Plaintiffs' second argument against
10 dismissal. Plaintiffs claim that they were never notified of the
11 bankruptcy proceedings, and that the bankruptcy therefore did not
12 "provide for" their claims. Resp. at 3. "[A] claim cannot be
13 considered to have been provided for by the plan if a creditor
14 does not receive proper notice of the proceedings." Ellett v.
15 Stanislaus, 506 F.3d 774, 777 (9th Cir. 2007) (quoting
16 Hairopoulos, 118 F.3d at 1244). Moreover, the "burden of
17 establishing that a creditor has received appropriate notice rests
18 with the debtor." Hairopoulos, 118 F.3d at 1244. The Certificate
19 of Service for the Plan does not suggest that any of the
20 Plaintiffs in this action were notified or had an opportunity to
21 submit a claim against Wolter in the bankruptcy proceedings. See
22 Bankr. Docket No. 10. Moreover, it is Wolter's burden to
23 establish notice, and through his nonparticipation in proceedings
24 before this Court he has failed to do so. Based on this, the
25 Court concludes that the debts sought by the Plaintiffs have not
26 been discharged by the bankruptcy proceeding. See Hairopoulos,

1 118 F.3d at 1246.³

2 **B. Default Judgment**

3 Plaintiffs properly served Wolter with the Complaint and
4 Summons in this action on October 2, 2008. See Proof of Service
5 of Summons, Docket No. 4. The proof of service indicates that the
6 documents were delivered to Wolter's home address and were
7 accepted by a competent individual over the age of 18 who was
8 informed of the general nature of the papers. Id. This service
9 complies with Federal Rule of Civil Procedure 4(e)(2)(B).

10 Accepting the allegations in the Complaint as true, as it
11 must, the Court finds that the Eitel factors favor default
12 judgment. The Plaintiffs' substantive claim appears solid on the
13 merits, and is plead sufficiently in the Complaint. Section
14 502(a) of the Employee Retirement Income Security Act of 1974
15 ("ERISA") gives the participants and beneficiaries of an ERISA-
16 governed pension plan a cause of action in federal court where an
17 employer violates the terms of the plan. See 29 U.S.C. §
18 1132(a)(1)(B), (a)(3). Plaintiffs have further shown that, by
19 failing to make timely contributions, Wolter has violated the
20 terms of the Bargaining Agreement. Mot. at 2. It is unlikely
21 that there can be a dispute over any of the factual issues that
22 cannot be resolved by reference to Wolter's own records, which
23 Plaintiffs now seek access to. The amount of money at issue will
24 be based upon these records.

25
26 ³ Plaintiffs did not argue that the suit should not be
27 dismissed on the basis of any ERISA or other statutory duty owed to
28 the Plaintiffs.

1 Defendant's default cannot be said to be the result of
2 excusable neglect. As previously noted, Wolter was properly
3 served. Prior to the suit's initiation, Plaintiffs sent multiple
4 letters to Wolter regarding the payments. See Kaplan Decl. ¶ 8,
5 Ex. E. While it is preferable to decide cases on the merits
6 whenever possible, this preference is not dispositive. Where a
7 party fails to defend against a complaint, as Wolter has failed to
8 do here, Rule 55 authorizes the Court to enter default judgment.
9 Klopping v. Fireman's Fund, No. C 94-2684, 1996 U.S. Dist. LEXIS
10 1786, at *10 (N.D. Cal. Feb. 14, 1996).

11 **C. Remedy**

12 Plaintiffs request that the Court order Wolter to submit to
13 an audit by their auditor. Plaintiffs have demonstrated that they
14 are contractually entitled to such an audit. See HWTFA art. III
15 § D. Under 29 U.S.C. § 1132(g)(2)(E), this Court is authorized to
16 award whatever equitable relief it deems appropriate. The Court
17 GRANTS Plaintiffs' request for injunctive relief.

18 Because Plaintiffs cannot now identify the amount of unpaid
19 contributions, the Court concludes that Plaintiffs' request for
20 default judgement as to unpaid contributions, interest, and
21 liquidated damages to be premature. Plaintiffs' request for
22 default judgment as to damages is DENIED WITHOUT PREJUDICE.

23 Plaintiffs request attorneys fees under 29 U.S.C.
24 § 1132(g)(2)(D), which states that upon a judgment in favor of a
25 plan in a suit such as this, the court shall award the plan
26 reasonable attorneys' fees and costs. Mot. at 4. Plaintiffs have
27 submitted a description of their fees and costs totaling \$3443.66.

1 Kaplan Decl. ¶¶ 11-12. As Plaintiffs have successfully
2 established that they are entitled to an injunction at this time,
3 the Court finds this request to be proper and the amount to be
4 reasonable. The Court GRANTS Plaintiffs' request for fees and
5 costs.

6
7 **V. CONCLUSION**

8 For the foregoing reasons, the Court GRANTS Plaintiffs
9 default judgment as to the injunctive relief sought. The Court
10 hereby AWARDS Plaintiffs \$2935.00 in attorney's fees, and \$508.66
11 in costs, for a total judgment of \$3443.66. Plaintiffs' request
12 for default judgment with regard to damages arising from
13 contributions that may be determined to be owed through an
14 upcoming audit, including liquidated damages and interest, is
15 DENIED WITHOUT PREJUDICE. Plaintiffs may move for default
16 judgment with regard to any later-discovered unpaid contributions
17 after the audit has taken place.

18 Plaintiffs must serve Wolter with this order in a manner
19 sufficient to ensure notice before attempting to conduct an audit
20 under the injunction. Wolter shall promptly submit to an audit of
21 its records for the period August 24, 2005 through the last day of
22 his business operations, by scheduling within twenty (20) days of
23 the date that he is served with this Order, an appointment with
24 Plaintiffs' auditor, in accordance with the auditors'
25 availability; and by providing the necessary documents and
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allowing the auditor access to them on or before the scheduled audit date.

This Default Judgment in no way affects or limits Plaintiffs' right to audit Wolter's records, as allowed by the Bargaining Agreement, or to pursue any available remedies for past or future delinquencies not addressed herein.

IT IS SO ORDERED.

May 26, 2009


UNITED STATES DISTRICT JUDGE