

United States District Court
For the Northern District of California

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

F. G. CROSTHWAITE and RUSSELL E. BURNS, in their capacities as Trustees of the Operating Engineers Health and Welfare Trust Fund, PENSION TRUST FUND FOR OPERATING ENGINEERS, PENSIONED OPERATING ENGINEERS' HEALTH AND WELFARE FUND, and OPERATING ENGINEERS LOCAL UNION NO. 3 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

No. C 10-01376 WHA

ORDER GRANTING IN PART MOTION FOR DEFAULT JUDGMENT

Plaintiffs,

v.

AAA CONSTRUCTION GROUP, INC.,
a California corporation,

Defendant.

_____ /

INTRODUCTION

In this ERISA action, plaintiffs move for default judgment against defendant AAA Construction Group, Inc. following its failure to appear in this action and respond to the complaint. Plaintiffs allege that defendant failed to make the required contributions, liquidated damages, and interest payments to plaintiffs as required by a bargaining agreement. Plaintiffs seek to recover these payments and attorney's fees and costs. Plaintiffs' counsel failed to appear at the hearing and later submitted a request to decide this motion on the papers. For the following reasons, plaintiffs' motion for default judgment is **GRANTED IN PART**.

STATEMENT

1
2 Plaintiffs filed this action on April 1, 2010. According to the complaint, plaintiffs Pension
3 Trust Fund for Operating Engineers and Pensioned Operating Engineers’ Health and Welfare
4 Fund are employee benefit plans. Plaintiffs F. G. Crosthwaite and Russell E. Burns are
5 fiduciaries of the Operating Engineers Health and Welfare Trust Fund, which is also an employee
6 benefit plan. Plaintiff Operating Engineers Local Union No. 3 of the International Union of
7 Operating Engineers, AFL-CIO, is a union and a party to a collective bargaining agreement with
8 defendant. Defendant AAA Construction Group, Inc. is an employer under ERISA.

9 The complaint alleges that the union plaintiff and defendant “entered into a collective
10 bargaining agreement requiring employer contributions to the Plaintiff Funds, and to the Union
11 for union dues and to the Bargained Plans.” The complaint lists funds that defendant is required
12 to contribute to under the collective bargaining agreement. Plaintiffs Crosthwaite and Burns are
13 co-chairmen of the board of trustees of the funds, which receive and administer contributions
14 made pursuant to the bargaining agreement to the plans. Under the bargaining agreement
15 defendant is also required to submit monthly reports on the number of hours worked by its
16 employees. For each delinquent payment under the bargaining agreement, defendant must pay
17 liquidated damages and interest as set forth in the agreement.

18 According to the complaint, defendant has failed to make the required contributions for
19 June 2009, submit monthly reports from July 2009 through February 2010, or pay previously
20 assessed liquidated damages and interest. As relief, plaintiffs request damages in the amount of
21 the unpaid contributions, liquidated damages, and interest, attorney’s fees and costs, and for an
22 injunction to prevent defendant from continuing to breach its obligations under the bargaining
23 agreement and ERISA. The complaint does not assert claims for relief set out from other
24 allegations, but rather reads as one narrative setting forth plaintiffs’ claims.

25 Plaintiffs attempted initial service on defendant on April 27, 2010 (Dkt. No. 7). Plaintiffs
26 moved for entry of default, but the Clerk declined to enter default (Dkt. No. 10). Plaintiffs
27 investigated addresses at which they could effectuate service on defendant or certain known
28 officers and directors of defendant. Through this investigation plaintiffs determined the address

1 of one of defendant’s officers and directors. Accordingly, service was effectuated on defendant
2 on August 21 (Dkt. No. 16). Defendant has failed to file any responsive pleading in this action.
3 Defendant also failed to appear at the case management conference. Default was entered on
4 September 28 (Dkt. No. 19).

5 Plaintiffs now move for default judgment against the defendant. A hearing on the motion
6 was noticed for December 9. Defendant was properly served with notice of the motion, which
7 included the hearing date and time (Dkt. No. 26). Defendant did not appear at the hearing, either
8 through a representative or through counsel.

9 **ANALYSIS**

10 FRCP 55(b)(2) permits a court, following an entry of default, to enter default judgment
11 against a defendant. “The district court’s decision whether to enter a default judgment is a
12 discretionary one.” *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The scope of relief
13 allowed through default judgment is limited by FRCP 54(c), which states that “[a] default
14 judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.”

15 **1. SERVICE OF PROCESS**

16 Plaintiffs had some initial challenges serving defendant. Eventually, however, they
17 successfully served Michael Arikat, who — according to documentation submitted by plaintiffs
18 — is an officer and director of defendant, as registered with the State of California. Serving Mr.
19 Arikat constitutes service to the defendant corporation. *See* Cal. Code Civ. Proc. 416.10. Mr.
20 Arikat was served at his residence on August 21. Pursuant to FRCP 4(e), this constitutes proper
21 service.

22 **2. MERITS OF THE CLAIMS AND SUFFICIENCY OF THE COMPLAINT**

23 In the Ninth Circuit, a court is to consider several factors in exercising its discretion to
24 award default judgment:

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

1 *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). After entry of default, well-pled
2 allegations in the complaint regarding liability are taken as true, except as to amount of damages.
3 *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002). Consequently, *Eitel* factors
4 two, three, and five weigh in favor of the entry of default judgment against defendant AAA
5 Construction Group. There is no dispute concerning material facts. The well-pled allegations in
6 plaintiffs’ complaint regarding liability are treated as true.

7 The well-pled facts establish the merits of plaintiffs’ case against defendant. ERISA
8 provides that:

9 Every employer who is obligated to make contributions to a multiemployer plan
10 under the terms of the plan or under the terms of a collectively bargained
11 agreement shall, to the extent not inconsistent with law, make such contributions in
12 accordance with the terms and conditions of such plan or such agreement.

13 29 U.S.C. 1145. Section 1145 created a federal cause of action against employers who have
14 failed to make timely contributions as required under collective bargaining agreements such as
15 the one in this action. In the present case, the complaint alleges that contributions from June 2009
16 and other damages owed under Section 1145 remain unpaid.

17 Given this delinquency, recoverable damages are set forth in 29 U.S.C. 1132(g)(2):

18 In any action under this subchapter by a fiduciary for or on behalf of a plan to
19 enforce section 1145 of this title in which a judgment in favor of the plan is
20 awarded, the court shall award the plan —

- 21 (A) the unpaid contributions,
22 (B) interest on the unpaid contributions,
23 (C) an amount equal to the greater of —
24 (i) interest on the unpaid contributions, or
25 (ii) liquidated damages provided for under the plan in an amount not in
26 excess of 20 percent . . . of the amount determined by the court under
27 subparagraph (A),
28 (D) reasonable attorney’s fees and costs of the action, to be paid by the defendant,
and
(E) such other legal or equitable relief as the court deems appropriate.

29 The well-pled allegations, taken as true for the limited purpose of determining liability, establish
30 that unpaid contributions and other damages existed at the time this lawsuit was filed. The relief

1 sought is generally within the scope of ERISA. In short, plaintiffs' complaint sufficiently states a
2 meritorious claim under ERISA.

3 The remaining *Eitel* factors favor entry of default judgment. *First*, absent entry, plaintiffs
4 might be unable to recover and provide the contributions owed to beneficiaries and members.
5 *Second*, it is unlikely that default was the result of excusable neglect. When defendant failed to
6 report or pay the contributions and damages at issue, demand was made on defendant to conform
7 with its contractual and statutory duties. *Third*, although federal policy favors decisions on the
8 merits, Rule 55(b) permits entry of default judgment in situations such as this where the defendant
9 refuses to litigate. *Fourth*, the sum of money at stake in this action is not unreasonable in light of
10 the allegations in the complaint. In sum, after careful consideration of all of the *Eitel* factors, this
11 order finds that the entry of default judgment against defendant AAA Construction Group is
12 warranted.

13 3. SCOPE OF RELIEF

14 Sections 1145 and 1132 are the statutory basis of defendant's duty to make timely
15 contributions to trust funds regulated by ERISA. Section 1132(g)(2) provides that plaintiffs are
16 entitled to unpaid contributions, liquidated damages, interest, and attorney's fees. These awards
17 are mandatory under ERISA when unpaid contributions are established. *Nw. Adm'rs, Inc. v.*
18 *Albertson's, Inc.*, 104 F.3d 253, 257-58 (9th Cir. 1996).

19 Plaintiffs seek a judgment granting the following relief: (1) \$2,095.56 in unpaid
20 contributions; (2) \$4,380.54 in liquidated damages; (3) \$754.39 in interest; (4) \$6,809.50 in
21 attorney's fees; (5) \$1,583.55 in costs; and (6) an order requiring "Defendant to submit all
22 contribution reports and make payment on all additional amounts found due." Though allegations
23 in the complaint regarding liability are taken as true, allegations as to the amount of damages are
24 not.

25 The requested relief for unpaid contributions in June 2009 is properly compensable under
26 29 U.S.C. 1132(g)(2)(A). Accordingly, plaintiffs are entitled to relief in the amount of \$2,095.56
27 in unpaid contributions.
28

1 As stated, plaintiffs also request \$4,380.54 in liquidated damages and \$754.39 in interest,
2 incurred due to late contribution payments from January 2009 through June 2009. When
3 plaintiffs seek to collect liquidated damages for delinquent contributions that have already been
4 paid, mandatory liquidated damages under Section 1132(g)(2) do not apply. *Idaho Plumbers &*
5 *Pipefitters Health & Welfare Fund v. United Mech. Contractors, Inc.*, 875 F.2d 212, 215 (9th Cir.
6 1989). However, liquidated damages and interest for late-paid contributions are allowable if they
7 are available under an enforceable contract, such as the collective bargaining agreement that is
8 present here. Section 12.13.00 of the agreement provides for the liquidated damages and interest
9 that were assessed here.

10 Plaintiffs' request suffers, however, from problems of proof. Based on a review of
11 plaintiffs' submissions, the contributions that underlie the assessment of liquidated damages and
12 interest themselves seem to have been paid before the filing of this lawsuit. Plaintiffs provide a
13 summary list of liquidated damages and interest owing from January 2009 through June 2009,
14 "[a]ccording to [their] records." There is no supporting documentation. There is no way to
15 compare records to determine what was owed versus what was paid, and when. In lieu of
16 evidence, plaintiffs merely provide their summary, which does not inspire confidence in this
17 context. Evaluation of plaintiffs' request for liquidated damages and interest relative to the
18 formula for their assessment under the bargaining agreement requires knowledge of the amount
19 owed, payments made, and dates of payment, which we do not have. Consequently, plaintiffs are
20 not entitled to their requested relief in the amount of \$4,380.54 in liquidated damages and
21 \$754.39 in interest.

22 Even when attorney's fees are mandatory under Section 1132(g)(2), a district court should
23 consider various relevant factors to determine the reasonableness of those fees. *Kemmis v.*
24 *McGoldrick*, 706 F.2d 993, 997-98 (9th Cir. 1983). These factors include:

25 (1) the time and labor required; (2) the novelty and difficulty of the questions
26 presented; (3) the skill requisite to perform the legal services properly; (4) the
27 preclusion of employment by the attorney due to acceptance of the case; (5) the
28 customary fee; (6) whether the fee is fixed or contingent; (7) time limitations
imposed by the client or the circumstances; (8) the amount involved and the results
obtained; (9) the experience, reputation, and ability of the attorneys; (10) the
"undesirability" of the case; (11) the nature and length of the professional
relationship with the client; and (12) awards in similar cases.

1 *Seymour v. Hull & Moreland Eng'g*, 605 F.2d 1105, 1117 (9th Cir. 1979). Plaintiffs submitted a
2 declaration of counsel in support of their request for \$6,809.50 in attorney's fees and \$1,583.55 in
3 costs. The declaration states generally what tasks were involved in pursuing this lawsuit, the
4 number of hours worked by three attorneys and one paralegal, their billing rates, the general
5 categories of costs incurred, and total figures for fees and costs incurred.

6 Plaintiffs' counsel's submissions are inadequate to evaluate the requested amount of fees
7 based on the *Seymour* factors. The submissions do not even address several of the factors and did
8 not include a breakdown of the fees incurred. Without more, this order cannot approve an award
9 of the requested amount of attorney's fees. As to costs, plaintiffs must make a request for taxable
10 costs in strict compliance with the civil local rules.

11 Plaintiffs lastly request an order requiring "Defendant to submit all contribution reports
12 and make payment on all additional amounts found due." This is not outside of the scope of relief
13 requested in the complaint, which stated a prayer for relief for an order "requiring that Defendant
14 comply with its obligations . . . [and] enjoining Defendant from violating" the bargaining
15 agreement and ERISA. Among the facts alleged in the complaint is that defendant has not
16 submitted a monthly report (or paid a contribution) from July 2009 through February 2010.

17 As stated above, Section 1132(g)(2)(E) provides for equitable relief. Defendant's
18 payment history presents a picture of a business that was content with delinquency for the first
19 half of 2009 and content with nonpayment and evasion since then. Defendant shall not be
20 allowed to continue in this manner. This order requires defendant AAA Construction Group, Inc.
21 to provide monthly Employer's Reports as set forth in the bargaining agreement to plaintiffs'
22 counsel, Saltzman & Johnson Law Corporation, for the months of July 2009 through November
23 2010. Plaintiffs must effect service through a valid process server within 30 days of the date of
24 this order. (This is necessary to subject defendant to the contempt power of the district court.)
25 Defendant AAA Construction Group is ordered to provide the reports specified above within 60
26 days of the date of this order.

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CONCLUSION

For the reasons set forth above, plaintiffs' motion for default judgment is **GRANTED IN PART**. Judgment in favor of plaintiffs and against defendant AAA Construction Group, Inc. in the amount of \$2,095.56 in unpaid contributions will be entered accordingly. Plaintiffs' request for liquidated damages, interest, and attorney's fees is denied for lack of proof. Defendant is ordered to provide monthly Employer's Reports to plaintiffs' counsel as stated above. Following the entry of judgment, plaintiffs may serve and file a bill of costs pursuant to the civil local rules.

IT IS SO ORDERED.

Dated: December 10, 2010.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE