

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

BAY AREA PAINTERS AND TAPERS)	Case No. 11-2086 SC
PENSION TRUST FUND, et al.,)	
)	ORDER DENYING APPLICATION
Plaintiffs,)	<u>FOR DEFAULT JUDGMENT</u>
)	
v.)	
)	
JACK HARRIS DRYWALL, INC.,)	
)	
Defendant.)	
)	

I. INTRODUCTION

Plaintiffs Bay Area Painters and Tapers Pension Trust Fund, et al. ("Plaintiffs") seek entry of Default Judgment against Defendant Jack Harris Drywall, Inc. ("Defendant"). ECF No. 14 ("Mot. for Default J."). Having considered the papers submitted, the Court concludes that entry of Default Judgment against Defendant is inappropriate because Plaintiffs have failed to effectuate proper service. Therefore, the Court DENIES Plaintiffs' Application WITHOUT PREJUDICE.

II. BACKGROUND

Plaintiffs filed the Complaint on April 28, 2011 alleging violations of the Employee Retirement Income Security Act

1 ("ERISA"). ECF No. 1 ("Compl."). On the following day they served
2 a summons on Defendant's agent for service of process by personal
3 service. ECF No. 9. After Defendant did not file a responsive
4 pleading or otherwise appear in the case, Plaintiffs requested
5 entry of default on May 23, 2011. ECF No. 12. The Clerk of the
6 Court entered default on May 26, 2011. ECF No. 13. Plaintiffs
7 then filed an application for default judgment on July 20, 2011
8 and, on the same day, served the application on Defendant by First
9 Class U.S. Mail. ECF No. 14; ECF No. 19.

10 The following allegations are taken from Plaintiffs'
11 Complaint. Plaintiffs are employee benefit plans, as defined by
12 ERISA, and their trustees, fiduciaries, administrators, and
13 beneficiaries. Compl. ¶¶ 1-3, 12-13. Defendant is a California
14 corporation and an employer under ERISA and the National Labor
15 Relations Act ("NLRA"). Id. ¶ 5.

16 Plaintiffs and Defendant are parties to a collective
17 bargaining agreement requiring Defendant to regularly pay
18 Plaintiffs certain sums of money, the amounts of which are
19 determined by the hours worked by Defendant's employees, among
20 other things. Id. ¶ 14. The collective bargaining agreement
21 provides that Defendant is to pay liquidated damages in the amount
22 of ten percent for each delinquent contribution. Id. Pursuant to
23 trust documents incorporated into the agreement, liquidated damages
24 increase to twenty percent for each delinquent contribution which
25 is the subject of litigation. Id. Additionally, interest accrues
26 on delinquent contributions at rates which are to be reasonably set
27 by the Plaintiffs. Id. Defendant also agreed to permit
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1 Plaintiffs' representatives to examine necessary records to
2 determine whether Defendant has made full payment owed under the
3 agreement and to pay audit fees. Id. ¶ 15.

4 Plaintiffs allege that an audit of Defendant's payroll
5 revealed that Defendant failed to pay amounts due under the
6 collective bargaining agreement for the period of January 1, 2007
7 through March 31, 2010 and that Defendant has refused to pay the
8 delinquent amounts, liquidated damages, or interest due. Id. ¶¶
9 19-20. Plaintiff brings this action alleging violations of the
10 bargaining agreement; ERISA § 515, 29 U.S.C. § 1145; and the Labor
11 Management Relations Act ("LMRA") § 301(a), 29 U.S.C. § 185(a).
12 Id. ¶ 18. Plaintiffs seek all unpaid contributions due for hours
13 worked, liquidated damages, interest on unpaid contributions,
14 attorneys' fees and costs, and audit costs. Id. at 6-7.

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16 **III. LEGAL STANDARD**

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

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26 **IV. DISCUSSION**

27 Federal Rule of Civil Procedure 4(c)(1) provides that "[a]
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1 summons must be served with a copy of the complaint." Service of a
2 summons without a copy of the full complaint constitutes
3 ineffective service of process. See W. Coast Theater Corp. v.
4 Portland, 897 F.2d 1519, 1529 (9th Cir. 1990); see also Albra v.
5 Advan, Inc., 490 F.3d 826, 829 (11th Cir. 2007). The Rules further
6 provide that an individual may be served by "delivering a copy of
7 the summons and of the complaint to the individual personally."
8 Fed. R. Civ. P. 4(e)(2)(A).

9 Here, copies of the summons were personally delivered to
10 Richard Scarlott, the agent for service of process for Defendant,
11 on April 29, 2011. ECF No. 9. There is no indication that a copy
12 of the Complaint was served on Defendant. Because Plaintiffs have
13 failed to serve the Complaint on Defendant in accordance with Rule
14 4, service of process is inadequate and entry of default judgment
15 is inappropriate.

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V. CONCLUSION

The Court DENIES Plaintiffs' Application for Default Judgment WITHOUT PREJUDICE and VACATES the Entry of Default filed on May 26, 2011. The Court GRANTS Plaintiffs 30 days leave to properly serve Defendant in accordance with the Federal Rules of Civil Procedure. The Court further GRANTS Plaintiffs leave to re-file an application for an entry of default if Defendant fails to respond to a properly served complaint in the time period specified by the Federal Rules of Civil Procedure. If default is entered, Plaintiffs may re-file an application for default judgment with proof of proper service.

IT IS SO ORDERED.

Dated: September 9, 2011



UNITED STATES DISTRICT JUDGE