

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, et al.,
Plaintiffs,

No. C 12-04789 WHA

v.

**ORDER GRANTING
PLAINTIFFS' MOTION FOR
DEFAULT JUDGMENT**

UTILITY SERVICES OF NEVADA, INC.,
a Nevada corporation, doing business in
California as UTILITY SERVICES OF NV,
INC.,
Defendant.

_____ /

INTRODUCTION

In this action under the Employee Retirement Income Security Act and Labor Management Relations Act, plaintiffs move for default judgment. For the following reasons, the motion is **GRANTED**.

STATEMENT

The facts alleged by plaintiffs are as follows. Defendant is signatory to several Subcontracting and/or Memorandum Project Agreements which incorporates all of the terms of the Master Construction Agreement for Northern California between the Associated General Contractors of California and the Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO. These agreements, collectively the "bargaining agreement," provide that defendant shall be bound by the wage rates, fringe benefit rates, hours and all other terms and conditions of employment contained in the bargaining agreement. The ERISA plaintiffs and trust funds are third party beneficiaries of that bargaining agreement.

1 The bargaining agreement requires defendant to make contributions based on the hours
2 worked by employees of defendant to the plaintiff ERISA trusts, requires defendant to pay
3 benefit contributions to plaintiffs, and enumerates the consequences should the employer fail to
4 do so. If a contribution is delinquent, the bargaining agreement mandates the defendant to pay
5 liquidated damages on the delinquent contributions equal to 10% of each month of delinquent
6 contributions, increased to 20% at the time litigation starts. Interest on delinquent contributions
7 is also due under the agreements at a rate of 10% per annum. The bargaining agreement also
8 provides for reimbursement of attorneys' fees and costs, as well as any other expenses incurred
9 in connection with the delinquency.

10 Defendant acknowledged its debt and entered into a letter agreement with plaintiff which
11 provided a payment plan for December 2011 through April 2012 contributions. Defendant
12 allegedly did not comply with the payment plan.

13 Plaintiffs filed this action to compel defendant to pay employee benefit contributions for
14 hours worked by its employees during the months of July 2011, December 2011, January 2012,
15 and April 2012 through July 2012, to pay liquidated damages and interest incurred on these
16 unpaid contributions, as well as for prior periods where contributions were paid late, and to pay
17 any additional contributions payable at the time of judgment, plus liquidated damages and
18 interest.

19 Plaintiffs state that plaintiffs seek to recover a total figure of \$24,664.10, comprising: (i)
20 contributions, liquidated damages, and interest totaling \$16,068.20; (ii) attorney's fees totaling
21 \$7,022.50; (iii) anticipated attorney's fees totaling \$1,080.00 in connection with the instant
22 motion and hearing; and (iv) \$493.40 in costs. Plaintiffs, however, miscalculated the liquidated
23 damages because it applied the 20% to unpaid contributions prior to filing the complaint. The
24 correct total figure is \$22,494.29.

25 Defendant has been served with all filed pleadings to date. The clerk entered default
26 against defendant in November 2012. The instant motion for default was filed in December
27 2012 with a hearing noticed for January 2013. Defendant did not file an opposition to plaintiffs'
28

1 motion for default judgment. Neither defendant nor plaintiff appeared at the default judgment
2 hearing.

3 **ANALYSIS**

4 **1. DEFAULT JUDGMENT**

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

11 District courts must consider several factors when exercising discretion to award default
12 judgment:

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

18 *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986).

19 After entry of default, well-pled allegations in the complaint regarding liability are taken
20 as true, except as to amount of damages. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th
21 Cir. 2002). Defendants never answered or otherwise responded to the complaint, so none of the
22 material liability facts are disputed. Indeed, because these facts are easily verifiable with
23 reference to the contracts and payment records, it is unlikely that they would be disputed. The
24 facts set forth in the complaint sufficiently state claims for relief for breach of a collective
25 bargaining agreement pursuant to ERISA (29 U.S.C. 1132, 1145) and the Labor Management
26 Relations Act (29 U.S.C. 185). Consequently, *Eitel* factors two, three, and five weigh in favor of
27 the entry of default judgment. For the following reasons, each of the remaining factors also
28 favors entry of default judgment.

1 *First*, if the motion were denied, plaintiffs would be without a remedy. Declining to
2 enter a default judgment therefore would result in prejudice to plaintiffs.

3 *Second*, the sum of money at stake is moderate. A large sum would disfavor default
4 judgment. *See Eitel*, 782 F.2d at 1472 (finding that, in light of the parties’ dispute as to material
5 facts, having a \$2,900,000 judgment at stake supported a decision not to enter default judgment).
6 Plaintiffs here seek a total judgment of \$24,664.10. Although a substantial amount, this is a far
7 cry from the \$2,900,000 sum contemplated in *Eitel*.

8 *Third*, it is unlikely that default was the result of excusable neglect. This action was filed
9 in September 2012, and defendant was properly served at that time. Defendant presumably was
10 aware of its payment obligations and was put on fair notice of this action against it.

11 *Fourth*, although federal policy favors decisions on the merits, Rule 55(b)(2) permits
12 entry of default judgment in situations such as this where a defendant refuses to litigate.

13 After consideration of all of the *Eitel* factors, this order finds that the entry of default
14 judgment is warranted.

15 **2. DETERMINATION OF RELIEF**

16 When judgment is entered against an employer who is found liable for delinquent
17 contributions, an award of unpaid contributions, interest, liquidated damages, and reasonable
18 attorney’s fees and costs, as provided in the agreement, is mandatory. 29 U.S.C. 1132(g)(2);
19 *Northwest Adm’rs, Inc. v. Albertson’s, Inc.*, 104 F.3d 253, 257 (9th Cir. 1996). Based on the
20 declarations submitted by plaintiffs, plaintiffs seek the following relief: (1) \$8,213.24 in unpaid
21 contributions; (2) \$934.37 in unpaid interest; (3) \$6,920.59 in liquidated damages; and, (4)
22 \$8,595.90 in attorney’s fees and costs. The total judgment sought is \$24,664.10.

23 **A. Unpaid Contributions**

24 Based on a spreadsheet compiled from “trust fund records” by plaintiffs’ collections
25 manager and a corresponding sworn declaration, plaintiffs ask for \$8,213.24 in unpaid
26 contributions for hours worked by defendants’ employees during the months of July 2011,
27 December 2011, January 2012, and April 2012 through July 2012 (Hayner Decl. ¶8 and Exh. F).
28 Plaintiffs’ request for unpaid contributions is adequately supported. It is therefore **GRANTED**.

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B. Interest

Interest on unpaid contributions must be calculated “by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.” 29 U.S.C. 1132(g)(2)(E). Simple interest is owed at 10% per annum on the unpaid contributions (Hayner Decl. ¶ 7 and Exh. E). Here, plaintiffs claim \$934.37 in interest (Hayner Decl. ¶ 10). This rate is reasonable and was agreed to by defendant when it signed the contracts (Hayner Exh. E). Plaintiffs’ request for interest is **GRANTED**.

C. Liquidated Damages

In addition to unpaid contributions, interest thereon, and reasonable attorneys’ fees and costs, “the court *shall* award the plan . . . an amount equal to the greater of – (i) interest on the unpaid contributions, or (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent.” 29 U.S.C. 1132(g)(2) (emphasis added). Here, the plan provides for liquidated damages at the rate of 10% of unpaid contributions, increasing to 20% after a lawsuit is filed, although liquidated damages are not applicable to all of the trust funds (Hayner Decl. ¶ 8). Plaintiffs request liquidated damages totaling \$6,920.59 (Hayner Decl. ¶ 9). Upon review of the record and the relevant law, this order finds that the liquidated damages were miscalculated because plaintiffs increased liquidated damages to 20% on contributions that were unpaid prior to filing the complaint. Rather, 10% should have been applied to the unpaid contributions of December 2011, January 2012, and April 2012 through July 2012. The correct figure for total liquidated damages is \$4,750.78. Plaintiffs’ request for liquidated damages is **GRANTED** for the amount of \$4,750.78.

D. Attorney’s Fees and Costs

Plaintiffs seek \$7,022.50 in attorney’s fees through December 12, 2012, \$1,080.00 in attorney’s fees in connection with preparation for and attendance at the hearing on this motion, and \$493.40 in costs, for a total of \$8,595.90 (Stafford Decl. ¶¶ 13–15). Plaintiffs have submitted a declaration from a supervising attorney stating that she billed 19.5 hours, and that a partner and two paralegals spent .50 and 23.5 hours, respectively (Stafford Decl. ¶ 13). Viewed as a whole, the documentation is adequate. Of the \$1,080, \$240 corresponds to paralegal time

1 spent on the instant motion and \$840 corresponds to anticipated attorney's fees for oral
2 argument. The \$840 for oral argument will be deducted because plaintiffs' attorney did not
3 appear at the hearing. Plaintiffs' request for attorney's fees and costs is **GRANTED** for the
4 amount of \$7,755.90.


5 **CONCLUSION**

6 For the above reasons, plaintiffs' motion for entry of default judgment is **GRANTED**.
7 Plaintiffs may recover the following: (1) \$8,213.24 in unpaid contributions; (2) \$934.37 in
8 unpaid interest; (3) \$4,750.78 in liquidated damages; and (4) \$7,755.90 in attorney's fees and
9 costs, for a total amount of \$21,654.29.

10 Ms. Stafford was not at fault in failing to appear at yesterday's hearing. Nonetheless,
11 the best course is to grant her motion for default judgment and not reduce her complicated
12 agreement to a different judgment (and retain long-term jurisdiction to supervise the payment
13 schedule).

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15 **IT IS SO ORDERED.**

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17 Dated: January 25, 2013.

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20 WILLIAM ALSUP
21 UNITED STATES DISTRICT JUDGE
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