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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WARREN BRAD JOHNSON,)	Civil No. 08cv1798-L(JMA)
Plaintiff,)	ORDER DENYING MOTION FOR ENTRY OF DEFAULT JUDGMENT [doc. #33]
v.)	
TIMOTHY WENNES, <i>et al.</i> ,)	
Defendants.)	
_____)	

After plaintiff Warren Brad Johnson's original complaint was dismissed without prejudice for failure to state a claim and for violation of Federal Rule of Civil Procedure 8, he filed a first amended complaint ("FAC") on December 17, 2008. The certificate of service indicates that he mailed the FAC to defendants' counsel of record on December 17, 2008. *See* Docket No. 28. On January 5, 2009, defendants filed a motion to dismiss the FAC or alternatively, for a more definite statement. *See* Docket No. 29.

Plaintiff now moves for entry of default judgment under Federal Rule of Civil Procedure 55 contending that defendants' motion to dismiss is untimely.

The Court first notes that plaintiff's motion for default judgment is premature because default has not been entered as required under Federal Rule of Civil Procedure 55(a):

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

1 A motion for default judgment may not be considered prior to entry of default. For this reason,
2 plaintiff's motion for default judgment will be denied.

3 Even if the Court construes plaintiff's motion for default judgment as a request for entry
4 of default, it would be denied because defendants have a timely motion to dismiss pending.

5 If a motion to dismiss is granted but with leave to amend, the time to respond by way of a
6 motion to dismiss or answer to the amended complaint is 10 days from service of the amended
7 pleading unless otherwise specified by the court or by stipulation. FED. R. CIV. P. 15(a)(3).¹
8 Federal Rule of Civil Procedure 6(a) provides the rules to apply in computing any time period
9 specified in the federal or local rules, court orders, or statutes. Because the time to respond to an
10 amended complaint is 10 days, the Court "[e]xclude[s] intermediate Saturdays, Sundays, and
11 legal holidays" in determining the due date. FED. R. CIV. P. 6(a)(2). The day the amended
12 complaint is mailed to defendants or their counsel is excluded from the computation. *See* FED.
13 R. CIV. P. 6(a)(1). "When a party may or must act within a specified time after service and
14 service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would
15 otherwise expire under Rule 6(a)." FED. R. CIV. P. 6(d). As noted above, plaintiff served the
16 FAC by mail; therefore, service was made under Rule 5(b)(2)(C) and an additional three days is
17 added to the 10-day response period.

18 Under the facts of this case, plaintiff mailed the FAC to defendants' counsel on December
19 17, 2008; therefore, the counting of the 10 days for a response to the FAC commences on
20 December 18, 2008. The following days are excluded from the count because they are either
21 Saturdays, Sundays or legal holidays²: December 20, 21, 25, 27, 28 and January 1, 3 and 4. As
22 discussed above, three additional days are provided to defendants because plaintiff mailed the
23 amended complaint to them. Based on these computational rules, defendants' answer or motion
24

25 ¹ Plaintiff incorrectly cites Civil Local Rule 7.1(e)(3) in support of his argument:
26 "FIVE (5) COURT DAYS TO RESPOND TO AMENDED COMPLAINT." But Civil Local
27 Rule 7.1(e)(3) is directed to a reply to a pending motion and not to responding to an amended
28 complaint. Although plaintiff is appearing without counsel, citations to clearly inapplicable law
is disingenuous at best.


² Federal Rule of Civil Procedure 6(a)(4) sets forth that Christmas Day and New
Year's Day are legal holidays.

1 to dismiss was due for filing on January 7, 2009. Defendants' motion to dismiss was filed on
2 January 5, 2009. Because defendants' response to the FAC was timely, entry of default is not
3 warranted.

4 Accordingly, plaintiff's motion for default judgment is **DENIED**. To the extent
5 plaintiff's motion for default judgment is intended to be a request for entry of default, the request
6 is **DENIED**.

7 **IT IS SO ORDERED.**

8 DATED: January 13, 2009

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10 
M. James Lorenz
United States District Court Judge

11 COPY TO:

12 HON. JAN M. ADLER
13 UNITED STATES MAGISTRATE JUDGE

14 ALL PARTIES/COUNSEL
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