

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge Robert E. Blackburn**

Civil Case No. 06-cv-02404-REB-BNB

ALTON LAYCE SMITH, and  
DAVIA LOMAX-SMITH,,

Plaintiffs,

v.

BANK OF NEW YORK, and  
MARY WENKE, in her personal and official capacity,

Defendants.

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**ORDER ADOPTING RECOMMENDATION OF THE  
UNITED STATES MAGISTRATE JUDGE**

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**Blackburn, J.**

This matter is before me on the following: 1) **Recommendation of United States Magistrate Judge** [#17], filed June 14, 2007; 2) **Recommendation of United States Magistrate Judge** [#23], filed September 28, 2007; and 3) **Motion for Default Judgment Pursuant to F.R.B.P. (sic) 55** [#20], filed June 27, 2007. The Magistrate Judge recommends that the plaintiffs' claims against the defendants be dismissed based on the plaintiffs' failure to prosecute, lack of proper service on certain defendants, and the plaintiffs' failure to comply with an order of the court. The plaintiffs have not filed objections to either recommendation. Therefore, I review the recommendations only for plain error. ***See Morales-Fernandez v. Immigration &***

**Naturalization Service**, 418 F.3d 1116, 1122 (10<sup>th</sup> Cir. 2005).<sup>1</sup> Finding no such error, I find and conclude that the magistrate judge's recommendations should be approved and adopted.

As described in the Magistrate Judge's September 28, 2007, recommendation [#23], the plaintiffs filed a motion for default judgment against Mary Wenke in her individual capacity. The Clerk of the Court declined to enter default against Wenke because the plaintiffs did not file an affidavit concerning her military status, as required by law. A Clerk's Note [#22] was entered in the record. The plaintiffs have not submitted the required affidavit nor have they taken any other action in this case since they filed their motion for default judgment.

**THEREFORE, IT IS ORDERED** as follows:

1. That the **Recommendation of United States Magistrate Judge** [#17], filed June 14, 2007, is **APPROVED AND ADOPTED** as an order of this court;

2. That the **Recommendation of United States Magistrate Judge** [#23], filed September 28, 2007, is **APPROVED AND ADOPTED** as an order of this court;

3. That under Fed. R. Civ. P. 4(m), Fed. R. Civ. P. 41(b), and D.C.COLO.LCivR 41.1, the plaintiffs' claims against defendant, Bank of New York, are **DISMISSED** without prejudice based on the plaintiffs' failure to serve properly this defendant and the plaintiffs' failure to prosecute these claims;

4. That under Fed. R. Civ. P. 4(m), Fed. R. Civ. P. 41(b), and D.C.COLO.LCivR 41.1, the plaintiffs' claims against defendant, Mary Wenke, in her official capacity are

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<sup>1</sup> This standard pertains even though plaintiffs are proceeding *pro se*. **Morales-Fernandez**, 418 F.3d at 1122.

**DISMISSED** without prejudice based on the plaintiffs' failure to serve properly this defendant, and the plaintiffs' failure to prosecute these claims;

5. That under Fed. R. Civ. P. 41(b) and D.C.COLO.LCivR 41.1, the plaintiffs' claims against defendant, Mary Wenke, in her individual capacity are **DISMISSED** without prejudice based on the plaintiffs' failure to prosecute these claims;

6. That the plaintiffs' **Motion for Default Judgment Pursuant to F.R.B.P. (sic) 55** [#20], filed June 27, 2007, is **DENIED** as moot; and

7. That this case is **DISMISSED**.

Dated February 5, 2008, at Denver, Colorado.

**BY THE COURT:**

**s/ Robert E. Blackburn**  
**Robert E. Blackburn**  
**United States District Judge**