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UNITED STATES DISTRICT COURT  
 WESTERN DISTRICT OF LOUISIANA  
 ALEXANDRIA DIVISION

CLARENCE SCHREANE

CIVIL ACTION NO. 09-1252

VERSUS

JUDGE TRIMBLE

JOE KEFFER, ET AL.

MAGISTRATE JUDGE KIRK

**MEMORANDUM RULING AND JUDGMENT**

Before the court is the report and recommendation of the magistrate judge concerning pending motions for summary judgment by plaintiff and defendant Tamechia Beemon (“Beemon” or “defendant”).<sup>1</sup>

The court has reviewed the motions, along with the remainder of the record, including objections filed by both plaintiff and Beemon, and concludes that the findings of the report and recommendation are correct under applicable law, except that the court declines to adopt the portion of the report and recommendation which states that Beemon’s failure to file an answer in this case results in the admission of all alleged facts not refuted in the motion.

Although the Fifth Circuit has yet to address this issue directly, it is widely accepted among courts and commentators that the filing of a motion for summary judgment prior to the filing of an answer tolls the delay for the filing of such answer during the pendency of the motion under Fed. R.

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<sup>1</sup>R. 42, 50.

Civ. P. 12.<sup>2</sup> We note, however, that while the court is free to enter summary judgment before the completion of discovery when the movant meets his burden of proof on such motion, the nonmoving party may also request additional discovery prior to consideration of the motion pursuant to Fed. R. Civ. P. 56(d). Our review of the record indicates that plaintiff has made a request for production of certain evidence he believes to be in defendant's possession and this motion is not addressed in the report and recommendation before us. Accordingly, it is hereby

**ORDERED** that the report and recommendation of the magistrate judge is **ADOPTED** insofar as this court finds that the motions for summary judgment filed by plaintiff and defendant should each be **DENIED**. The court declines to adopt that portion of the report and recommendation, referenced above, that equates defendant's filing of a motion for summary judgment prior to her answer with an admission as to any fact not specifically refuted in the summary judgment motion. Defendant has not waived her right to file an answer in this case and, to that end, it is hereby

**ORDERED** that defendant file an answer in this matter within fifteen (15) days of the issuance of this memorandum ruling and order. It is further

**ORDERED** that the magistrate judge shall consider plaintiff's motion for production [R. 44] and shall issue a ruling thereon in due course with notice to all parties. Our review of the record further indicates that defendant's motion for reconsideration of the magistrate judge's service order

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<sup>2</sup>First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968); Brooks v. Menifee, 2010 WL 774049 (W.D. La. 2010); Marquez v. Cable One, Inc., 463 F.3d 1118 (10<sup>th</sup> Cir. 2006); Rashidi v. Albright, 818 F. Supp. 1354 (D.Nev. 1993); INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391 (6<sup>th</sup> Cir. 1987); Southern Pacific Transportation Co. v. National Molasses Co., 540 F.2d 213 (5<sup>th</sup> Cir. 1976); 10A Wright, Miller & Kane, Federal Practice and Procedure § 2718 (3d ed.).

remains pending, although, no service issues remain for decision, all necessary parties having been served at this time. Accordingly, it is hereby

**ORDERED** that defendant's motion for reconsideration [R. 31] is **DENIED** as **MOOT**.

**THUS DONE AND SIGNED** in chambers at Alexandria, Louisiana this 16<sup>th</sup> day of February, 2011.

  
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**JAMES T. TRIMBLE, JR.**  
**UNITED STATES DISTRICT JUDGE**