

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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Thomas John Kelly,

Civ. No. 08-5028 (JMR/JJK)

Plaintiff,

v.

**REPORT AND  
RECOMMENDATION**

Frerich, Correctional Officers; John Doe, Correctional Officers; Distell, Saint Paul Police Officers; Doe, Saint Paul Police Officers; and Rob, Jail Nurse;

Defendants.

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Thomas John Kelly, 227367, MCF, 1000 Lake Shore Dr., Moose Lake, MN, 55767, *pro se*.

C. David Dietz, Esq., Assistant Ramsey County Attorney, counsel for Defendants Frerich and John Doe.

Cheri M. Sisk, Esq., Assistant Saint Paul City Attorney, counsel for Defendants Distell, Doe, and Rob.

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JEFFREY J. KEYES, United States Magistrate Judge

This matter is before this Court on the Motion Requesting Default Judgment Against Defendants By Plaintiff (Doc. No. 41). Plaintiff seeks default judgment because “Defendants and/or their Attorneys have failed to respond to Plaintiff’s complaint within the allotted time frame stated in the Federal Rules of Civil Procedure.” (*Id.* ¶ 1.) The matter has been referred to this Court for a report and recommendation under 28 U.S.C. § 636 and Local Rule 72.1.

Federal Rule of Civil Procedure 55(a) provides that “[w]hen a party against whom a judgment for affirmative relief is sought has *failed to plead or otherwise defend*,” default judgment may be entered. Fed. R. Civ. P. 55(a) (emphasis added). Plaintiff’s motion is without merit because Defendants did not fail to plead or otherwise defend in this case. Defendants Distell and Doe filed an Answer to the Complaint two days after the case was removed to this Court, which satisfied the timing requirements for the filing of a responsive pleading. (Doc. Nos. 1, 3.) On September 8, 2008, this Court cancelled a pretrial conference and directed Defendants to file any dispositive motions within 30 days of its Order. (Doc. No. 7.) Defendants complied with this Order by filing motions to dismiss within 30 days of that Order. (Doc. Nos. 8, 15.) Filing a motion to dismiss prior to filing an answer is permitted by the Federal Rules. Fed. R. Civ. P. 12(b) (permitting any Rule 12(b) defense to be raised by motion in lieu of filing a responsive pleading). For these reasons, Defendants pleaded and otherwise defended themselves appropriately in this case, and Plaintiff’s motion for default judgment should be denied.

### **RECOMMENDATION**

Based on the files, records, and proceedings herein,

**IT IS HEREBY RECOMMENDED** that:

1. The Motion Requesting Default Judgment Against Defendants By Plaintiff (Doc. No. 41) be **DENIED**.

Date: April 16, 2009

s/ Jeffrey J. Keyes  
JEFFREY J. KEYES  
United States Magistrate Judge

Under D.Minn. LR 72.2(b) any party may object to this Report and Recommendation by filing with the Clerk of Court, and serving all parties by **April 30, 2009**, a writing which specifically identifies those portions of this Report to which objections are made and the basis of those objections. Failure to comply with this procedure may operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals. A party may respond to the objecting party's brief within ten days after service thereof. All briefs filed under this rule shall be limited to 3500 words. A judge shall make a de novo determination of those portions of the Report to which objection is made. This Report and Recommendation does not constitute an order or judgment of the District Court, and it is therefore not appealable directly to the Circuit Court of Appeals.