

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTHONY R. BOYKIN
Plaintiff
VS.
V. ATWOOD, et al.

CV-N-04-0505-ECZ (JPC)
PLAINTIFF'S MOTION FOR RECONSIDERATION
OF DENIAL OF PLAINTIFF'S MOTION FOR
DEFAULT / DENIAL OF PLAINTIFF'S MOTION
FOR SANCTIONS

DISTRICT OF
FILED
U.S. DISTRICT COURT

Plaintiff, Pro Se, respectfully submit Plaintiff's Motion for reconsideration of Denial of Plaintiff's Motion for Default / Denial of Plaintiff's Motion for Sanctions. This motion is made pursuant to ~~U.S.C. P. 4(b), Fed. R. Civ. P. 12(g)(1), 55(a)(1)(B)(2)(e), E.L.C.P. 28~~ U.S.C. P. 4(b), Fed. R. Civ. P. 12(g)(1), 55(a)(1)(B)(2)(e), E.L.C.P. 28 & 36 (b)(1)(A), 28 § 1446 (a)(b). This motion is further made and based upon all other prior pleadings, papers and documents on file herein and 28 § 1446 (a)(b)

A
POINTS AND AUTHORITIES

Plaintiff would like the Honorable Judge Reed to reconsider Plaintiff's Motion for Default Judgment and Plaintiff's Motion for Sanctions which were denied at CD # 100 and to Address the issue of Jurisdiction with respect to Defendant Surgeon Pertaining to Count II of Plaintiff's Amended Complaint.

I. DEFENDANT SURGEON NEVER FILED A MOTION OR NOTICE OF REMOVAL TO FEDERAL COURT PURSUANT TO 28 U.S.C. SECTION 1441. THEREFORE FEDERAL COURT HAS NO JURISDICTION TO HEAR OR DENY PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT OR COUNT II OF PLAINTIFF'S AMENDED COMPLAINT.

Pursuant to 28 § 1446 (a) and (b). A defendant or defendants desiring to remove any civil action... from a state court shall file in the District Court of the United States for the District and division within which such action is pending a notice of removal signed pursuant to Rule 11 of Fed. R. Civ. P. and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, orders served upon such defendant or defendants in such action - See § 1446 (b). The court will note that defendant Surgeon was served pursuant to U.S.C.P. 4(c) on 9-19-09 and the attorney general's office of defendant Surgeon never filed for removal. (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after receipt by the defendant through service or otherwise of a copy of the initial pleading setting forth the claim for

relief upon which the action or proceedings is based, or within thirty days after service of summons upon the defendant, if such pleading has been filed in court and is not required to be served upon the defendant whichever period is shorter.

II. THE COURT AT CD# 13 IN THAT ORDER STATED: PLAINTIFF'S COMPLAINT NAMES SEVERAL DEFENDANTS WHILE THE COURT IS ENFORCED THAT ADDITIONAL DEFENDANTS HAVE BEEN SERVED WITH THE STATE COURT COMPLAINT. ONLY DEFENDANT SURGEON HAS CURRENTLY APPEARED IN THIS ACTION. IF ANY DEFENDANT OBJECTS TO REMOVAL, THIS COURT WILL BE REQUIRED TO REMAND THIS MATTER TO STATE COURT. SEE *EMRICH V. TOLUHE & ROSS CO.*, 846 1190, 1193 (9TH CIR. 1988).

Pursuant to CD# 13 This matter (Count II) as a matter of law must be remanded to state court since defendant surgeon never filed an answer to the initial or amended complaints filed 12-10-04 and 1-11-05. Additionally the court never ordered Plaintiff to re-serve defendant surgeon in CD# 13. CD# 23 never ordered Plaintiff to re-serve defendant surgeon. The court specifically stated "Boylein is responsible for affecting SERVICE OF PROCESS ON UNSERVED DEFENDANTS". DEFENDANT SURGEON WAS SERVED ON 9-19-04. Therefore the Magistrate erred stating there is no evidence on file with the court that defendant surgeon served when this case was pending before the Seventh Judicial District Court at CD# 100. ~~XXXXXX~~

III. SUBDIVISION (9) of Fed R. Civ. P. 12 FORBIDS SUCCESSIVE MOTIONS TO DISMISS AND INSUFFICIENCY OF SERVICE PROCESS IS WAIVED. On 12-10-04 and 1-11-05 defendants filed the initial and Amended answers to Plaintiff's complaints. Neither of these answers alleged or used the affirmative defense of insufficiency of service process per Fed R. Civ. P. 12(b). On 12-10-04 Defendants Mullin and Green filed Motion to Dismiss. Plaintiff did not oppose. On 3-7-05 Defendants filed an opposition to Plaintiff's Motion for Summary Judgment with respect to all counts of Plaintiff's Amended complaint; Defendant surgeon's Motion to Dismiss. Defendant surgeon only defense is he was never served with service of process per Rule 12(b)(5) of Fed R. of Civ. P.

The court notes 12 + at CD# ~~100~~ 83 a a "y of the summons served on Sturgeon with the State Court Complaint pursuant to N.E.S. 4001. The Magistrate directed the clerk to send both sides of the summons to Sturgeon. For Sturgeon to file an amended Motion to dismiss and to address insufficiency of the service and to file an amended answer to Plaintiff's Motion for Summary Judgment at CD# 24 and 60 respectively. Defendant Sturgeon declined to do either.

Subdivision (g) of Rule 12 has forbidden who makes a pre-answer motion under this rule from making a further motion presenting any defense or objection which was available to him at the time he made the first motion and which he could have included but did not in fact include therein. Subdivision (h) - the question has arisen whether an omitted defense which cannot be made the basis of a second motion may nevertheless be pleaded in the answer. Subdivision (h) called for waiver of "*** defenses and objections which he does not present *** by motion *** or, if he made no motion in his answer." Defendant Sturgeon never filed an answer. Plaintiff filed motion for default (Defendant Sturgeon then filed a successive motion, i.e. Motion to dismiss on 3-7-05. alleging service of process was insufficient). That defense is meritless and was waived due to Sturgeon never filing an answer to the complaint. If the clause "if he has made no motion" was read literally, it seemed that the omitted defense was waived and could not be pleaded in the answer. On the other hand, the clause might be ~~read~~ read as adding nothing of substance to the preceding words: The Magistrate for some reason has made the allegation that defendant Sturgeon was never served. This is contradicted by the Magistrate directing the clerk to send Sturgeon a copy of both sides of the summons which includes the affidavit of the person effectuating service on Sturgeon. The Court will note that the attorney general's office never ~~acknowledged~~ acknowledged defendant Sturgeon as a party to this action because defendant never requested the attorney general's office to represent him. Defendant Sturgeon's motion to dismiss is fatally flawed due to the fact that his allegation of having not been served is a sham. Plaintiff requests this honorable court to reconsider the Magistrate's denial of Plaintiff's Motion for Default Judgment at CD# 100 as the record reflects Sturgeon has not to this day submitted an answer or notice of removal to Federal Court. How can Sturgeon be allowed to file successive motions when this violates Fed R. Civ. P. 12 (g)? Fed R. Civ. P. 12 (b) specifically states

in Pertinent Part: A motion making any of these defenses shall be made before any Pleading if a further Pleading is permitted. ~~There~~ There is no defense of insufficiency of service process listed in Defendant's Answer and Amended Answer to Plaintiff's complaint. Furthermore Defendant Sturgeon's matter of law was required to present that defense in the answer to the complaint which he never answered, or before he filed an answer. A Party who makes a motion under rule 12 and join with it any other motions herein provided for and then available to that Party. If the Party makes a motion under this rule but omits therefrom any defense or objection then available to the Party which this rule permits to be raised by motion, the Party shall not thereafter make a motion based on the defense or objection so omitted, except as provided in subdivision (h)(2) on any grounds there stated. Rule 12 (g) of Fed. R. Civ. P.

A defense of ~~xxx~~ insufficiency of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it neither made by motion nor included in a responsive Pleading or a amendment thereof permitted by rule 15(a) to be made as a matter of course. (See Fed. R. Civ. P. 12 (g) Consolidation of Defenses in motion); Defendant's Answer and Amended Answer to Plaintiff's Complaints.

Subdivision (h)(1) (A) eliminates any ambiguity and states that certain specified defenses which were available to a Party when he made a pre-answer motion, but which he omitted from the motion, are waived. The specified defenses include insufficiency of service process. A motion made by a Party invites the court to pass on the threshold of the defense should bring forward all specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions.

III. PURSUANT TO Section 283 (b)(1) A Plaintiff request the court to reconsider any Pretrial motion under this ~~sub~~ sub-Paragraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law. Specifically the Honorable magistrate's order denying Plaintiff's motion for default Judgment against Defendant Sturgeon based on the defense of insufficiency of service process due to the court never ordering Plaintiff to reserve an already served defendant. Defendant Sturgeon

was served and did not file an answer, did not file for removal of
jurisdiction and therefore defaulted pursuant to Fed. R. Civ. P. 55.
No good cause exists to set aside default Judgment against
defendant Sturgeon

CERTIFICATE OF SERVICE

I certify under Penalty of Perjury that a true and correct
copy of Plaintiff's Motion for Reconsideration of ~~Plaintiff's~~ Denial
Plaintiff's Motion for default/ Denial of Plaintiff's Motion for
Sanctions was mailed to:

Court Clerk, 400 S. Virginia Street, Reno, NV, 89501
E. Gulbenkian, 555 E. Washington Av., LV, NV, 89101
This 16th Day of June 2005

Anthony R. Botkin