

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 Milton O. Crawford,)
4)
5 Plaintiff,)
6 vs.)
7 Smith's Food and Drug Centers, Inc.; and The)
8 Kroger Company,)
9 Defendants.)

Case No.: 2:12-cv-00122-GMN-GWF

ORDER

10 Pending before the Court are several motions filed by pro se Plaintiff Milton O.
11 Crawford against Defendant The Kroger Company ("Kroger"), apparently requesting the same
12 relief of default judgment: Motion for Default (ECF No. 57); Application for Default Judgment
13 Against the Kroger Company (ECF No. 99); Motion for Judgment by Default (ECF No. 109);
14 and Motion for Judgment by Default (ECF No. 113).

15 Also before the Court are Kroger's related motions: Motion to Set Aside Entry of
16 Default (ECF No. 64) and Motion for Sanctions (ECF No. 102), requesting costs and fees.

17 I. BACKGROUND

18 Plaintiff originally filed suit against Defendant Smith's Food and Drug Store, Inc.
19 ("Smith's"), accompanied by an Application to Proceed In Forma Pauperis. (ECF No. 1.) After
20 screening Plaintiff's original complaint, United States Magistrate Judge George Foley, Jr.,
21 dismissed it without prejudice with leave to amend. (Order, March 8, 2012, ECF No. 9.)
22 Plaintiff then submitted his proposed Amended Complaint, adding claims against Defendant
23 Kroger.¹ (Mot. Delivery of Compl. & Summons, ECF No. 14.) Judge Foley ordered that the

24
25 ¹ Plaintiff also apparently named the specific store from which he was terminated, "Smith's Food and Drug," as a
separate defendant. (See ECF No. 16.) However, since that store does not appear to be a separate legal entity
from Defendant Smith's (see Answer, 2:1 n.1, ECF No. 36), the Court will refer solely to Defendant "Smith's."

1 Amended Complaint be filed in the docket, and that Plaintiff shall be allowed to proceed on his
2 claims for racial discrimination, age discrimination, retaliation, and a hostile work
3 environment.² (Order and R&R, May 10, 2012, ECF No. 15.) Judge Foley also granted
4 Plaintiff's Motion for Delivery of Complaint and Summons (ECF No. 14), and ordered the
5 Clerk of the Court to issue summons to Defendants and to deliver the summons to the United
6 States Marshal for service. (Id.) The same day, on May 10, 2012, Plaintiff's Amended
7 Complaint was filed and the Clerk issued the Summons. (Am. Compl., ECF No. 16; Summons,
8 ECF No. 17.)

9 On June 8, 2012, Proof of Service was filed as to Defendant Smith's. (ECF No. 23.) On
10 June 18, 2012, Plaintiff filed a Motion for Extension of Time for Service, indicating that the
11 U.S. Marshal told him that service upon Defendant Kroger would require additional time. (ECF
12 No. 28.) Judge Foley denied the motion without prejudice, with leave to renew the request at a
13 later date, closer to the service deadline of September 7, 2012. (Order, June 19, 2012, ECF No.
14 29.)

15 On September 7, 2012, Judge Foley conducted a Pre-trial Discovery Conference in
16 which it was brought to his attention that Defendant Kroger had not yet been served. (Order,
17 Sept. 7, ECF No. 48.) Judge Foley noted that a Summons was previously issued by the Clerk's
18 office, and that the status of service on Defendant Kroger was unknown. (Id.) Judge Foley
19 therefore gave instructions to Plaintiff to fill out the required USM-285 forms again, so that the
20 U.S. Marshal could effect service of the summons. (Id.) Judge Foley also ordered the Clerk of
21 the Court to deliver the relevant documents to the U.S. Marshal for service. (Id.)

22 On September 19, 2012, Proof of Service was filed as to Defendant Kroger at the
23 _____

24 ² Judge Foley also submitted a Report and Recommendation to dismiss Plaintiff's claims for gender and wage
25 discrimination and intentional infliction of emotional distress. (Order and R&R, May 10, 2012, ECF No. 15;
Min. Order, May 21, 2012, ECF No. 20.) The Court accepted Judge Foley's Report and Recommendation,
dismissing with prejudice Plaintiff's claims for gender and wage discrimination and intentional infliction of
emotional distress. (Order, June 25, 2012, ECF No. 30; Order, March 15, 2013, ECF No. 120.)

1 address 1014 Vine Street, Cincinnati, Ohio 45202-1100. (ECF No. 52.) The U.S. Marshal or
2 Deputy, Kimberly James, signed and certified on August 6, 2012, that she had “legal evidence
3 of service” for “the process described on the individual, company, corporation, etc., at the
4 address shown above on the on the [sic] individual, company, corporation, etc., shown at the
5 address inserted below.” (Id.)

6 The next day, on September 20, 2012, Plaintiff filed a motion styled as “Motion Request
7 for Affidavit to Enter Default” and “Motion for Extension,” with no explanation, but attaching
8 the form for Clerk’s Entry of Default used in the District of Nevada, and a copy of the Proof of
9 Service form. (ECF No. 54.) The Clerk’s Office filed a Clerk’s Entry of Default as to
10 Defendant Kroger the following day. (ECF No. 55.)

11 On September 24, 2012, Plaintiff filed the first Motion for Default (ECF No. 57)
12 currently pending before the Court, as to Defendant Kroger, and counsel for Defendant Kroger
13 filed Notices of Appearance before the Court the next day (ECF Nos. 59-61).

14 On October 5, 2012, Defendant Kroger filed the instant Motion to Set Aside Entry of
15 Default (ECF No. 64), a Response (ECF No. 66) to Plaintiff’s Motion for Default, and a
16 Memorandum in support of both (ECF No. 65). A series of briefs were then filed by Plaintiff
17 and Defendant Kroger relating to these two motions, including: the parties’ responses and
18 replies (ECF Nos. 68, 73, 75, 78); Plaintiff’s additional motions – Application for Default
19 Judgment Against the Kroger Company (ECF No. 99); Motion for Judgment by Default (ECF
20 No. 109); and Motion for Judgment by Default (ECF No. 113); and Defendant Kroger’s
21 additional Motion for Sanctions (ECF No. 102), requesting costs and fees, as part of its
22 opposition to Plaintiff’s redundant request for default judgment. At this time all these motions
23 have been fully briefed.

24 **II. LEGAL STANDARD**

25 A Clerk’s Entry of Default is governed by Rule 55(a) of the Federal Rules of Civil

1 Procedure, which provides:

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

5 Fed. R. Civ. P. 55(a).

6 The time to serve a responsive pleading or otherwise defend is provided under Rule 12
7 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(a)-(b). Rule 12(a)(1)(A) provides
8 that a defendant must serve an answer within twenty-one days after being served with the
9 summons and complaint, unless another time is specified by the rule or by federal statute, or
10 defendant has timely waived service. Fed. R. Civ. P. 12(a)(1)(A). Rule 12(b) provides for how
11 to present defenses. Fed. R. Civ. P. 12(b).

12 Under Rule 55, a court may set aside an entry of default for good cause. Fed. R. Civ. P.
13 55(c). In the Ninth Circuit, to determine whether good cause has been shown under Rule 55(c),
14 a court must consider whether any of the following factors are true: (1) whether the moving
15 party engaged in culpable conduct that led to the default; (2) whether the moving party had no
16 meritorious defense; or (3) whether setting aside the entry of default would prejudice the
17 opposing party. *United States v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d
18 1085, 1091 (9th Cir. 2010). Upon such a finding, a court may refuse to set aside the default. *Id.*
19 However, “judgment by default is a drastic step appropriate only in extreme circumstances; a
20 case should, whenever possible, be decided on the merits.” *Id.* (quoting *Falk v. Allen*, 739 F.2d
21 461, 463 (9th Cir. 1984)).

22 **III. DISCUSSION**

23 The Proof of Service signed by the U.S. Marshal's Office as to Defendant Kroger
24 appears to indicate service on August 6, 2012. (ECF No. 52.) A copy of a fax from the U.S.
25 Marshal's Office to Plaintiff was filed in the docket the same day, communicating to Plaintiff
that service was effected on Defendant Kroger on August 6, 2012. (ECF No. 53.) After August

1 6, 2012, twenty-one days elapsed as of August 27, 2012. The Clerk's Entry of Default was
2 requested by Plaintiff on September 20, 2012, and entered by the Clerk's Office on September
3 21, 2012. (ECF Nos. 54-55.) Defendant Kroger does not allege that it waived service.

4 Attached to his first Motion for Default (ECF No. 57), Plaintiff includes a copy of the
5 Proof of Service (ECF No. 52) filed by the U.S. Marshal's Office on September 19, 2012, that
6 appears to have been altered by the handwritten addition of "served certified mail proof of
7 delivery attached" in the "Remarks" section of the form, and the addition of a copy of a
8 certified mail receipt. (See ECF No. 57-1.)

9 Opposing Plaintiff's motion, Defendant Kroger disputes that Plaintiff has perfected
10 service, but does not dispute the validity of service by certified mail under Ohio state law. (See
11 Mem. in Support, 9:9 & n.2, ECF No. 65.) Defendant Kroger also argues that even assuming
12 service was perfected, the Clerk's Entry of Default should be set aside pursuant to Rule 55(c).
13 (ECF Nos. 64, 65.)

14 Here, the Court does not find that Defendant Kroger engaged in culpable conduct that
15 led to the default, that it has no meritorious defense, or that setting aside the entry of default
16 would prejudice the opposing party. The Court finds further that the circumstances presented
17 here do not qualify as "extreme" sufficient to justify the "drastic step" of judgment by default,
18 and that instead, this case should be decided on the merits. Accordingly, the Court will grant
19 Defendant Kroger's Motion to Set Aside Entry of Default (ECF No. 64) and will set aside the
20 Clerk's Entry of Default (ECF No. 55). As a consequence, and because Defendant Kroger will
21 no longer be in default, the Court must deny Plaintiff's Motion for Default (ECF No. 57),
22 Application for Default Judgment Against the Kroger Company (ECF No. 99); Motion for
23 Judgment by Default (ECF No. 109); and Motion for Judgment by Default (ECF No. 113).

24 Finally, the Court considers Defendant Kroger's Motion for Sanctions (ECF No. 102),
25 and finds that sanctions are not justified here, despite the multiple redundant filings of Plaintiff

1 relating to default judgment. In this action Plaintiff is representing himself, and has
2 demonstrated perseverance in attempting to follow the sometimes incomplete, inaccurate, and
3 conflicting instructions of this Court, the Clerk's Office, and the U.S. Marshal. Furthermore,
4 there is no evidence that the lengthy and confusing difficulties in effecting service upon
5 Defendants are attributable to Plaintiff, as opposed to the U.S. Marshal's Office, the Clerk's
6 Office, or this Court. Accordingly, and because the Court finds no significant prejudice to
7 Defendant Kroger, the Court finds no basis to award costs and fees as sanctions for Plaintiff's
8 redundant filings.

9 **IV. CONCLUSION**

10 **IT IS HEREBY ORDERED** that Defendant Kroger's Motion to Set Aside Entry of
11 Default (ECF No. 64) is **GRANTED**.

12 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Default (ECF No. 57);
13 Application for Default Judgment Against the Kroger Company (ECF No. 99); Motion for
14 Judgment by Default (ECF No. 109); and Motion for Judgment by Default (ECF No. 113) are
15 **DENIED**.

16 **IT IS FURTHER ORDERED** that Defendant Kroger's Motion for Sanctions (ECF No.
17 102) is **DENIED**.

18
19 **DATED** this 20th day of May, 2013.

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23 Gloria M. Navarro
24 United States District Judge
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