

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

VICTORIA SETHUNYA and CLETUS
SETHUNYA,

Plaintiffs,

vs.

BONAIR MANAGEMENT and SHALISE
VIGIL,

Defendants.

Case No. 2:09-CV-249-CW

REPORT AND RECOMMENDATION

Before the court is Plaintiffs' Motion for Default Judgment. (Docket Entry #10). Plaintiffs argue that the court must enter a default judgment against Defendants because Defendants did not respond to their summons within twenty days.

Defendants filed a Motion to Dismiss for Lack of Jurisdiction on April 13, 2009, the day Defendants were required to respond to Plaintiffs' complaint. (Docket Entries #3, 6). As set forth in their memorandum in opposition to Plaintiffs' motion, Defendants communicated with Plaintiffs to ensure that Plaintiffs received a copy of the Motion to Dismiss, as well as its attachments. It is undisputed that Defendants' motion

appeared on the court's docket and that Plaintiffs received a copy of it.

Rule 55 of the Federal Rules of Civil Procedure provides that default judgment is only appropriate when "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules." Rule 12 provides that a pre-answer motion to dismiss is an appropriate defense for purposes of Rule 55 and that no answer is due until the court resolves the motion, unless the court postpones the disposition of the motion until the trial on the merits. See Fed. R. Civ. P. 12(a)(1), 12(a)(4)(A). Therefore, because Defendants timely filed their Motion to Dismiss, the action has been properly defended, and Plaintiffs' Motion for Default Judgment should be denied.

RECOMMENDATION

Based on the above analysis, **IT IS RECOMMENDED** that Plaintiffs' Motion for Default Judgment (Docket Entry #10) be **DENIED**.

Copies of the foregoing Report and Recommendation are being mailed to the parties who are hereby notified of their right to object to the same. The parties are further notified that they must file any objections to the Report and Recommendation, with the clerk of the district court, pursuant to 28 U.S.C. § 636(b),

within ten (10) days after receiving it. See 28 U.S.C. § 636(b)(1). Failure to file objections may constitute a waiver of those objections on subsequent appellate review.

Dated this 12th day of May, 2009.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "Samuel Alba", is written above a horizontal line.

Samuel Alba
United States Magistrate Judge