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**UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

UTE INDIAN TRIBE OF THE UINTAH
AND OURAY RESERVATION,

Plaintiff,

v.

GREGORY D. MCKEE; T & L
LIVESTOCK, INC.; MCKEE FARMS,
INC.; AND GM FERTILIZER, INC.,

Defendants.

**MOTION TO STRIKE
DEFENDANTS' ANSWER, SET
ASIDE DENIAL OF DEFAULT,
AND ENTER DEFAULT
JUDGMENT**

Civil Case No. 2:18-cv-00314-CW

Judge Clark Waddoups

COMES NOW Plaintiff, the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe"), by and through its undersigned counsel, to request that this Court strike Defendants' Answer because it was filed late and was not accompanied by a motion for

an extension of time. Furthermore, Plaintiff requests that this Court set aside its Order Denying Application and Request for Entry of Default. Finally, Plaintiff requests this Court enter Default Judgment in favor of Plaintiff for Defendants' failure to file a timely answer and for failure to file any response to Plaintiff's Application and Request for Entry of Default and Default Judgment.

FACTS

Plaintiff filed its Complaint in this case on April 17, 2018. Process was served on Defendants on May 8, 2018. Therefore, pursuant to Federal Rules of Civil Procedure ("F.R.C.P.") Rule 12(a)(1)(A)(i), Defendants were required to respond by May 29, 2018. Defendants did not file their Answer until July 10, 2018. Once Defendants had failed to file their Answer by the applicable deadline, Plaintiff filed an Application and Request for Entry of Default Judgment against Defendants on June 4, 2018. Defendants were required to serve a responsive pleading to the Request, if any, by June 18, 2018 in accordance with F.R.C.P. Rule 12(a)(4)(A). To date, Defendants have still not filed any response to Plaintiff's Application and Request for Entry of Default and Default Judgment. On August 15, 2018, this Court issued an Order Denying Application and Request for Entry of Default.

ARGUMENT

I. Defendants' Answer Must be Stricken for Failure to File a Motion for an Extension of Time and Failure to Make a Showing of Excusable Neglect

F.R.C.P. Rule 6(b) allows a court, for good cause, to extend the time in which a party must complete an action. A court can grant an extension of time without a motion if the request is made prior to the specified time expiring. F.R.C.P. 6(b)(1)(A). If the

request for extension is not made until after the specified time has expired, then the request must be made by motion and there must be a showing that the failure to act in time was due to excusable neglect. F.R.C.P. 6(b)(1)(B). Defendants failed to request an extension of time both before and after the specified time for the filing of their Answer had passed.

Defendants submitted their Answer 42 days after their filing deadline without a request for an extension or a showing of excusable neglect. The decision of a district court to accept or deny an untimely filed answer is reviewed for abuse of discretion. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 896 (1990); *Buchanan v. Sherrill*, 51 F.3d 227, 228 (10th Cir. 1995). Under these circumstances, this Court has no discretion to entertain Defendants' untimely Answer.

In the Supreme Court case of *Lujan v. National Wildlife Federation*, the Court reviewed F.R.C.P. Rule 6 and made explicitly clear that "any *post* deadline extension must be 'upon motion made.'" 497 U.S. 871, 896 (1990). In *Smith v. District of Columbia*, the D.C. Circuit Court of Appeals relied on the language set forth in *Lujan* to hold that the lower district court had abused its discretion in allowing a late motion to be filed when no motion for extension was made. 430 F.3d 450, 456-57 (D.C. Cir. 2005). Explaining its decision, the Circuit Court stated that, "[i]n the absence of any motion for an extension, the trial court had no basis on which to exercise its discretion. Under these circumstances, then, we are compelled to conclude that the district court abused its discretion in entertaining the late motion" *Id.* (internal citations omitted). Based on the above, it is clear that this Court does not have the discretion to entertain Defendants'

late Answer because, like the defendant in *Smith*, Defendants never filed a motion for an extension.

Assuming for the sake of argument that Defendants had filed a motion for an extension, their late Answer still should not be allowed. In addition to having to file a motion for an extension, a party seeking to file a late pleading must show that the untimeliness of the pleading is due to excusable neglect. The burden is on the movant under Rule 6(b) to establish that failure to act timely was the result of excusable neglect. *Yonofsky v. Wernick*, 362 F. Supp. 1005 (S.D.N.Y. 1973). The Supreme Court has set forth the following factors to determine what constitutes excusable neglect: (1) the danger of prejudice to the other party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). A finding of excusable neglect requires both a demonstration of good faith and a reasonable basis for not complying within the specified period. *In re Four Seasons Sec. Laws Litigation*, 493 F.2d 1288, 1290 (10th Cir. 1974).

Defendants made no attempt to show that the untimely filing of their Answer was due to excusable neglect even though the showing was theirs to bear. Without such a showing, pursuant to F.R.C.P. Rule 6, Defendants' Answer could not be entertained by this Court even if a motion for extension had been filed.

II. The Order Denying Application and Request for Entry of Default Must be Set Aside

F.R.C.P. Rule 55(b)(2) allows a party to apply to a court for a default judgment.

However, before a default judgment can be entered against an adverse party, default must first be entered. *Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 783 (8th. Cir. 1998) (noting that entry of default under Rule 55(a) must precede grant of a default judgment under Rule 55(b)); *Ramada Franchise Sys. v. Baroda Enters., LLC*, 220 F.R.D. 303, 305 (N.D. Ohio Feb. 25, 2004) (same). In accordance with F.R.C.P. Rule 55(a), when a request for default is made to the Clerk of Court against a party who has failed to plead or defend, and such failure is shown “by affidavit or otherwise,” then the Clerk of Court “must enter the party’s default.”

On June 4, 2018, Plaintiff requested the Clerk of Court to enter default against Defendants for failure to submit an answer or otherwise appear to defend in the matter. The request was accompanied by an affidavit showing that Defendants had failed to plead or otherwise defend the matter as well as proof of adequate service of process. Under these circumstances, the Clerk of Court has no discretion to deny the entry of default. *See Sourcecorp Inc. v. Croney*, 412 Fed. Appx. 455, 458, n. 2 (3d Cir. 2011) (stating that “when a defendant has failed to plead or otherwise defend, the clerk must enter the party’s default” and that “[a]n entry of default is a purely ministerial act carried out by a court clerk on request in cases in which a defendant has failed to plead or otherwise defend.”) (internal quotations omitted); *Peterson v. Syracuse Police Dep’t*, 467 Fed. Appx. 31, 33 (2d. Cir. 2012) (also noting that the entry of default by the clerk of court is a “ministerial” act).

However, here the Clerk of Court issued an Order Denying Application and Request for Entry of Default on the dual grounds that (1) there was no prejudice to Plaintiff

as result of Defendants' delay in filing their Answer and (2) this Court would prefer to resolve this dispute on the merits. While those may be appropriate considerations when determining whether to enter a default judgment, *see United States v. Scharringhausen*, 2003 U.S. Dist. LEXIS 23417, *2 (S.D. Cal. 2003), they are not considerations when dealing with an entry of default. For these reasons, this Court should set aside the Order Denying Application and Request for Entry of Default and enter default against Defendants as required by F.R.C.P. Rule 55(a).

III. Default Judgment Should be Entered Against Defendants

When deciding whether to exercise its discretion to enter a default judgment, there are certain factors a court should consider. Among those factors are (1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in action; (5) the possibility of dispute concerning material facts; (6) whether default was due to excusable neglect; and (7) strong policy underlying Federal Rules of Civil Procedure favoring decisions on merits. *United States v. Scharringhausen*, 2003 U.S. Dist. LEXIS 23417, *2 (S.D. Cal. 2003). All of the foregoing factors taken together support the entry of a default judgment against Defendants.

The first factor regarding prejudice to the plaintiff weighs in favor of the Tribe because Defendants' late filing of their Answer prejudices the Tribe. Defendants' actions are delaying the resolution of this case. This case is in desperate need of resolution because it deals with water which is the Tribe's most precious resource due to the dry and arid location of the Tribe's reservation. Any unnecessary delays in the disposition of

this case cause prejudice to the Tribe. The merits of the Tribe's claims and the sufficiency of the Tribe's Complaint also support entry of default judgment because the Tribe put forth only meritorious claims and filed a complaint that was more than sufficient for Defendants to answer on its merits. There is also a substantial amount of money at stake in this litigation that is owed to Plaintiff by Defendants for their wrongful conduct, making the fifth factor weigh in favor of the Tribe as well.

There is no room to dispute the material facts set forth by Plaintiff in its Complaint and, as discussed above, Defendants' failure to timely answer the Complaint was not due to excusable neglect as no showing of excusable neglect has been made. Only the final factor has the potential to weigh in Defendants' favor, while the other six factors clearly and soundly support the entry of a default judgment.

Moreover, there are additional factors relating to the facts of this litigation that support an entry of default judgment. First, entry of a default judgment for failure to defend is appropriate when the conduct of the defaulting party includes willful violations of court rules, contumacious conduct, or intentional delays. *Fingerhut Corp. v. Ackra Direct Mktg. Corp.*, 86 F.3d 852, 856 (8th Cir. 1996). Because Defendants did not even attempt to make a showing of excusable neglect or explain the untimeliness of their Answer, this Court is left with the conclusion that the late filing must have been due to a willful violation of the Court's rules, disobedient conduct, or an attempt to intentionally delay the disposition of this matter. *See Arthur F. Williams, Inc. v. Helbig*, 208 F.R.D. 41 (E.D.N.Y. 2002) (determining that, since defendants' failure to respond was unexplained, the failure was willful).

Likewise, the failure to serve an answer within twenty days after being served with the Summons and Complaint, as required by FRCP 12(a)(1)(A), is appropriate grounds for entry of default judgment. *McMillen v. J.C. Penney Co.*, 205 F.R.D. 557, 558 (D. Nev. 2002).

Defendants filed their Answer over 40 days late with no explanation as to why and no request for an extension. Additionally, Defendants have yet to respond to Plaintiff's request for entry of default and default judgment. Taking all of the above into consideration, it is clear that the entry of default judgment against Defendants is required by F.R.C.P. Rule 55(a).

REQUEST FOR RELIEF

For all the reasons set forth herein, this Court should strike Defendants' untimely filed Answer, set aside the Order Denying Application and Request for Entry of Default, and enter default judgment against Defendants.

Respectfully submitted this 28th day of January, 2019.

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/s/ Frances C. Bassett

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