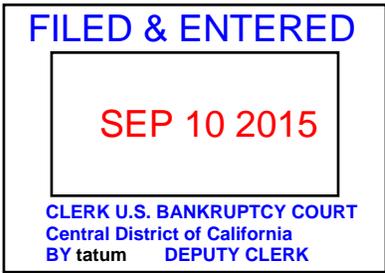


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OPINION NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:
RITA GAIL FARRIS-ELLISON,
Debtor.
JAMES LEE CLARK,
Plaintiff,
vs.
RITA GAIL FARRIS-ELLISON, et al.,
Defendants

Case No. 2:11-bk-33861-RK
Chapter 7
Adv. No. 2:12-ap-01830-RK

**ORDER DENYING PLAINTIFF'S
MOTION FOR DEFAULT JUDGMENT
AGAINST DEFENDANT RITA GAIL
FARRIS-ELLISON UNDER LOCAL
BANKRUPTCY RULE 7055-1**

This adversary proceeding came on for hearing on August 25, 2015, on the motion of Plaintiff James Clark ("Plaintiff") for default judgment against Defendant Rita Gail Farris-Ellison ("Defendant") (ECF 126). Plaintiff appeared in pro per for himself. James A. Bryant II, Attorney at Law, appeared for Defendant.

Plaintiff filed his Second Amended Complaint for equitable relief and damages on March 6, 2013 (ECF 71). Defendant filed her answer to the Second Amended Complaint on February 10, 2015 (ECF 121). Plaintiff filed his request for entry for default against Defendant on March 2, 2015 (ECF 124), and the Clerk of Court entered a notice that

1 default was not entered on March 2, 2015 (ECF 125). Plaintiff filed his motion for default
2 judgment against Defendant on March 4, 2015 (ECF 126). There is a dispute between
3 the parties whether Defendant served Plaintiff with her answer when it was filed on
4 February 10, 2015. Plaintiff contends that he did not receive a copy of Defendant's
5 answer to the Second Amended Complaint when he filed his motion for default judgment
6 because he was never served with Defendant's answer, and counsel for Defendant filed
7 a declaration on March 24, 2015 (ECF 137) that he served the answer to the Second
8 Amended Complaint on Plaintiff by mail for Defendant on February 10, 2015, but that he
9 was re-serving the answer by mail on Plaintiff on March 24, 2015 (ECF 138).

10 On this record, default judgment cannot entered against Defendant because by
11 her answer to the Second Amended Complaint filed on February 10, 2015, she filed a
12 response to the Second Amended Complaint indicating her intent to defend the action.
13 While Rule 55(a) of the Federal Rules of Civil Procedure, applicable to this adversary
14 proceeding pursuant to Rule 7055 of the Federal Rules of Bankruptcy Procedure,
15 provides that default may be entered by the Clerk of Court if the defendant fails to plead
16 or otherwise defend within the permitted time, no default can be entered if the defendant
17 has filed a response indicating an intent to defend the action. *Direct Mail Specialists, Inc.*
18 *v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 689 (9th Cir. 1988), *citing, H.F.*
19 *Livermore Corp. v. Aktiengesellschaft Gebruder Lofpfe*, 432 F.2d 689 (D.C. Cir. 1970);
20 *see also*, 1 Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial*, ¶
21 6:28 at 6-6 (2015). Even a late-filed responsive pleading prevents entry of default. 1
22 Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial*, ¶ 6:28 at 6-6,
23 *citing, Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1317 (11th Cir.
24 2002). “[D]efault judgments are generally disfavored” as “[i]t is the policy of the law that,
25 whenever possible, cases should be decided on their merits,” and thus, “[a]s a result, any
26 doubts as to the propriety of a default are usually resolved against the party seeking a
27 default judgment.” 1 Wagstaffe, *California Practice Guide: Federal Civil Procedure*
28 *Before Trial*, ¶ 6:11 at 6-2, *citing inter alia, Pena v. Seguros La Comercial, S.A.*, 770 F.2d

1 811, 814 (9th Cir. 1985). By her answer to the Second Amended Complaint filed in this
2 adversary proceeding, Defendant has indicated an intent to defend, and thus, default
3 judgment should not be entered as a disfavored remedy. Moreover, Defendant's intent to
4 defend this adversary proceeding was also previously manifested by her original and
5 amended motions for remand and for abstention in response to Plaintiff's First Amended
6 Complaint (ECF 44, 45 and 65).

7 Plaintiff's motion for default judgment against Defendant should also be denied
8 because his motion lists the date of service of the original Complaint (ECF 1) of July 17,
9 2012 and the date of expiration of the time for filing an answer to that Complaint of
10 August 17, 2012 as the dates on which his motion for default judgment is based, which is
11 defective pleading because Plaintiff subsequently filed two superseding complaints in this
12 adversary proceeding, the First Amended Complaint and the Second Amended
13 Complaint, and because the now operative complaint in this adversary proceeding is the
14 Second Amended Complaint which was filed on March 6, 2013, after the dates listed for
15 Defendant's service and alleged default in Plaintiff's motion for default judgment. ECF
16 126 at 1. The original Complaint which the present motion for default judgment was
17 superseded by Plaintiff's First Amended Complaint on August 28, 2012 (ECF 16), which
18 was filed after Flagstar Bank filed its motion to dismiss the original Complaint.
19 Subsequently, on March 6, 2013, the First Amended Complaint was superseded when
20 Plaintiff filed his Second Amended Complaint (ECF 71), which is now the operative
21 complaint in this adversary proceeding. "An amended complaint supersedes the original,
22 the latter being treated thereafter as non-existent." *Valadez-Lopez v. Chertoff*, 656 F.3d
23 851, 857 (9th Cir. 2011), *citing inter alia*, *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474
24 (9th Cir. 1997) and *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967).

25 Thus, Plaintiff's motion for default judgment against Defendant based on the
26 obsolete dates of service on Defendant of, and alleged default on, the original Complaint
27 (ECF 1), which has been superseded by the First Amended Complaint, and now, the
28 Second Amended Complaint, is procedurally defective. Since Plaintiff is seeking relief

1 against Defendant on the Second Amended Complaint rather than the superseded
2 original Complaint, he should rely upon the dates of service and alleged default for that
3 complaint rather than the superseded one, which is now considered legally non-existent.
4 But as discussed previously, default judgment should not be entered against Defendant
5 on the Second Amendment because by serving and filing her answer to the Second
6 Amended Complaint, Defendant has indicated her intent to defend in this adversary
7 proceeding.

8 For the foregoing reasons, the court denies Plaintiff's motion for default judgment.

9 IT IS SO ORDERED.

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Date: September 10, 2015



Robert Kwan
United States Bankruptcy Judge