2017 WL 6021420
United States District Court, C.D. California.

UNITED STATES of America
v.
John Van KATWYK

Case No. CV 17–3314–GW(JCx)
|
Filed 10/23/2017

Attorneys and Law Firms

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PROCEEDINGS: PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST JOHN VAN KATWYK [14]

GEORGE H. WU, UNITED STATES DISTRICT JUDGE

***1** Court and counsel confer. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. Plaintiff's Motion is GRANTED.

The Court will allow Defendant to file his motion under Rule 60 within 30 days from the date of this order.

I. Background

United States of America ("Plaintiff") moves for a default judgment against John Van Katwyk ("Defendant"). Plaintiff personally served Defendant with a copy of the Summons and Complaint in this case—regarding Defendant's willful failure to report his interest in foreign financial accounts—on May 19, 2017. *See generally* Docket No. 1 ("Complaint"); *see also* Motion for Default Judgment ("MDJ"), Docket No. 14. Defendant has failed to file an answer. *See generally* MDJ.

Defendant has been a lawful permanent resident of the United States since approximately 1983. *See* Complaint ¶ 11. In 1992, Defendant obtained ownership and control over an account held with UBS AG in the name of the Calimco Foundation, with an account number ending #2603 ("Calimco Account"). *See id.* ¶ 12. Between 1993 and 2004, Defendant used the Calimco Account for the payment of his own expenses. *See id.*

Defendant successfully filed foreign bank account reports ("FBAR") with the United States for the taxable years 1993, 1998, 1999, 2000, and 2003. *See id.* ¶ 13. For example, on his 1993 FBAR form, Defendant reported his interest in an account with "Credit Lyonnais BK Nederland Par" with a balance between $10,000 and $50,000. *See id.* In addition, on Defendant's 1998, 1999, 2000, and 2003 FBAR forms, Defendant reported his interest in an account held with Fortis Bank Netherlands with the account number ending #7773, and an account balance between $10,000 and $50,000. *See id.* However, Defendant failed to report his interest in the Calimco Account on any of the abovementioned FBAR forms. *See id.*

In 2004, Defendant traveled to Liechtenstein and set up a foreign trust entity named the Shaq Foundation. *See id.* ¶ 14. Defendant then traveled to Zurich in Switzerland and opened a new account with UBS AG in the name of the Shaq Foundation, with an account number ending #8555 ("Shaq Foundation Account"). *See id.* All funds held in the Calimco Account were subsequently transferred into the Shaq Foundation Account. *See id.* During the years 2004 through 2008, while the balance of the Shaq Foundation Account always exceeded $10,000, Defendant failed to file FBAR forms and report the Shaq Foundation Account's existence to his U.S. income tax return preparer. *See id.* ¶¶ 15, 17. Throughout those five years, Defendant used funds from the Shaq Foundation Account to pay for his personal expenditures. *See id.* ¶ 16.

During the time of Defendant's failure to file an FBAR, the balance of the Shaq Foundation Account was at least $800,432. *See id.* ¶ 22. On June 12, 2015, the Internal Revenue Service ("IRS") assessed an FBAR penalty in the amount of $80,043 against Defendant for his willful failure to report his interest in foreign financial accounts in violation of 31 U.S.C. § 5314. *See id.* ¶ 23. On the same date, the IRS sent Defendant notice and demand for payment. *See id.* Despite being issued notice and demand for payment, Defendant failed to make any payments against his FBAR penalty for the 2008 taxable year. *See id.* ¶ 24. As of December 2, 2016, the total outstanding balance, consisting of the FBAR penalty, penalties for late payment, and statutory interest, totaled $88,341.16. *See id.* ¶ 25.

II. Legal Standard

***2** The procedural prerequisites to the entry of default judgment are set out in Federal Rule of Civil Procedure ("FRCP") 55 and Local Rule 55–1. These prerequisites require that a party moving for default judgment submit a declaration or otherwise provide information (1) indicating when and against which party default has been entered; (2) identifying the pleading as to which default has been entered; (3) indicating whether the defaulting party is an infant, or incompetent person, and if so, whether that person is represented by a general guardian, committee, conservator or other representative; (4) stating that the Servicemembers Civil Relief Act, 50 U.S.C. App. § 521, does not apply; and (5) affirming that notice has been served on the defaulting party, if required by Rule 55(b)(2). *See* FRCP 55(b)(2); C.D. Cal. L.R. 55–1.

Once the procedural prerequisites have been satisfied, entry of default judgment is left to the trial court's sound discretion. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092–93 (9th Cir. 1980); *Landstar Ranger, Inc. v. Parth Enters., Inc.*, 725 F.Supp.2d 916, 919 (C.D. Cal. 2010). The Ninth Circuit has held that a district court may consider the following factors in exercising its discretion to award a default judgment:

> (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the [FRCP] favoring decisions on the merits.

Eitel v. McCool, 782 F.2d 1470, 1471–72 (9th Cir. 1986). "In applying this discretionary standard, default judgments are more often granted than denied." *PepsiCo v. Triunfo–Mex, Inc.*, 189 F.R.D. 431, 432 (C.D. Cal. 1999). Such judgments are proper, for instance, where defendant has never appeared in the action, his failure to defend is unexplained, and the plaintiff would suffer prejudice if the default were not entered. *See Chrysler Credit Corp. v. Macino*, 710 F.2d 363, 367 (7th Cir. 1983).

Further, a party seeking a default judgment must state a claim upon which it may recover. *See PepsiCo, Inc., v. Cal. Sec. Cans*, 238 F.Supp.2d 1172, 1172 (C.D. Cal. 2002). After a default has been entered by the court clerk, the well-pleaded factual allegations of the complaint are taken as true, except for those allegations relating to damages. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987); *Discovery Commc'ns, Inc. v. Animal Planet, Inc.*, 172 F.Supp.2d. 1282, 1288 (C.D. Cal. 2001). Where damages are liquidated (*i.e.*, ascertainable from definite figures contained in the documentary evidence or in detailed affidavits), default judgment may be entered without a damages hearing. *See Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1323 (7th Cir. 1983); *Allergan Inc. v. Mira Life Grp. Inc.*, No. SACV 04–36 JVS (MLGx), 2004 U.S. Dist. LEXIS 26881, at *9 (C.D. Cal. June 9, 2004). The Court need not make detailed findings of fact in the event of default. *See Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990).

III. Analysis

A. Plaintiff Has Met the Procedural Requirements for Default Judgment

Plaintiff's application for default judgment complies with FRCP 55(a) and (b)(2), as well as Local Rule 55–1. First, Plaintiff has stated, by declaration, that Plaintiff filed a request for default against Defendant with the Clerk of the Court on August 8, 2017 and default was entered by the Clerk on August 9, 2017. Declaration of James C. Hughes ("Hughes Decl."), MDJ, ¶ 9. Second, Plaintiff's Complaint is the pleading on which default was entered. Hughes Decl. ¶¶ 2–3. Third, Plaintiff declared that Defendant is not an infant based on correspondence containing Defendant's date of birth. Hughes Decl. ¶¶ 15–16. Plaintiff also declared that Defendant is not incompetent based on: (a) Plaintiff's ignorance of any proceeding to adjudicate competency or prior judicial determinations of incompetency; (b) Plaintiff's ignorance of any guardian or other representative appointed to act on behalf of Defendant; and (c) the absence of any obvious outward signs of mental incompetency when speaking with Defendant on the phone. Hughes Decl. ¶¶ 15, 17. Fourth, Plaintiff informs the Court that the Servicemembers Civil Relief Act does not apply based on

a copy of the results of a search for Defendant in the Department of Defense Manpower Data Center. Hughes Decl. ¶ 18. Finally, under FRCP 55(b)(2) Plaintiff is not required to serve Defendant with written notice of the application because Defendant failed to appear personally or by a representative. FRCP 55(b)(2).

B. Eitel Factors Weigh in Favor of Awarding Plaintiff Default Judgment

***3** In exercising its discretion to award a default judgment, this Court considers the *Eitel* factors. The first six *Eitel* factors appear to weigh in favor of granting Plaintiff's Motion for Default Judgment. The seventh factor tends to weigh against default judgment since it always favors adjudication on the merits. However, the seventh factor is not dispositive in and of itself. Consequently, on balance, the Court would GRANT Plaintiff's request.

1. Plaintiff Will Suffer Prejudice If Motion for Default Judgment Is Denied

With respect to the first *Eitel* factor, Plaintiff has demonstrated that prejudice will result in the absence of entry of a default judgment against Defendant because his failure to participate in this action would leave Plaintiff without apparent recourse for recovery. *See Roberts v. Cal. Dep't of Corr.*, No. 2:13–CV–07461–ODW, 2014 WL 879808, at *2 (C.D. Cal. Mar. 5, 2014) (citing *Cal. Sec. Cans,* 238 F.Supp.2d at 1177) ("There is a possibility of prejudice to the plaintiff when denying default judgment would leave the plaintiff without an alternate recourse for recovery."). The evidence before this Court establishes that Defendant has been assessed a civil FBAR penalty (along with accumulated penalties and interest) of $88,341.16. Hughes Decl., Exh. D. As a result, Plaintiff will be prejudiced if this court does not reduce the aforementioned civil penalty to judgment because Plaintiff will have no other recourse for recovering that penalty.

2. Substantive Merits and Sufficiency of the Complaint

The second and third *Eitel* factors require that a plaintiff "state a claim on which the [plaintiff] may recover." *Cal. Sec. Cans*, 238 F.Supp.2d at 1175 (*quoting Kloepping v. Fireman's Fund*, No. C 94–2684 THE, 1996 WL 75314, at *2 (N.D. Cal. Feb. 13, 1996) (*citing Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978). On entry of a default, well-plead allegations in the complaint regarding liability are generally deemed true. *See Geddes v. United Fin. Corp.*, 559 F.2d 557, 560 (9th Cir. 1977); *see also Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988) (holding that "facts which are not established by the pleadings of the prevailing party, or claims which are not well-pleaded, are not binding and cannot support the [default] judgment").

In the instant case, Plaintiff sufficiently stated a claim on which it can recover. To prevail on its Complaint to reduce an FBAR penalty to judgment, Plaintiff must prove that Defendant: 1) is a United States citizen or resident; 2) who has an interest in, or signature or other authority over, a foreign bank, securities, or other financial account; 3) in which the aggregate balance of such account exceeded, at any time during the calendar year, $10,000; and 4) failed to report that interest to the IRS by June 30 of the year following any calendar year. *See* 31 C.F.R. §§ 1010.350, 1010.306(c); 31 U.S.C. § 5314; *United States v. Bohanec*, No. 2:15–CV–4347 DDP (FFMx), 2016 WL 7167860, at *3 (C.D. Cal. Dec. 8, 2015) ("United States citizens who have a financial interest in, or signature authority over, a foreign bank account are required to file a [FBAR]."). If any person willfully fails [1] to timely report interest in a foreign bank, securities, or other financial account to the IRS, then the maximum penalty shall be increased to the greater of either $100,000 or fifty percent of the balance in the account at the time of the violation. 31 U.S.C. § 5321(a)(5)(C)–(D). Here, Plaintiff has sufficiently alleged that: (1) Defendant is a permanent resident of the United States; (2) Defendant is the beneficial owner of the Shaq Foundation Account held with UBS AG in Switzerland during the tax year 2008; and (3) the aggregate balance of the Shaq Foundation Account exceeded $10,000 during the tax year 2008. *See* Complaint ¶¶ 11, 14–16. Accordingly, Defendant was required to annually file an FBAR to report his interest in the Shaq Foundation Account for each year the account existed and contained an amount greater than $10,000. *See* 31 U.S.C. § 5314; 31 C.F.R. § 1010.305(c). Defendant failed to make any such report or filing on or before June 30, 2009, with respect to the 2008 tax year. *See id.* ¶ 17. Consequently, Defendant is liable for the FBAR violation for the tax year 2008.

***4** Furthermore, Plaintiff plead facts sufficient to establish that Defendant's failure to report his foreign

bank account constituted a willful violation. A reckless disregard to statutory duty may be sufficient to satisfy willfulness. *United States v. McBride*, 908 F.Supp.2d 1186, 1204 (D. Utah 2012) (" 'willfulness' may be satisfied by establishing the individual's reckless disregard of statutory duty ...."). In a case concerning a failure to report certain information to the IRS, conduct can be classified as willful if the defendant failed to investigate the legality of the conduct. *Id.* at 1209. Here, Defendant was clearly aware of FBAR reporting requirements as he had made previous disclosures to the IRS regarding his other foreign bank accounts. Furthermore, if Defendant was unaware of his obligation to report the Shaq Foundation Account (which he failed to even disclose to his US income tax return preparer), he recklessly ignored the risk that the conduct is illegal by failing to investigate the conduct's legality. The second and third *Eitel* factors thus weigh in favor of granting default judgment.

3. Sum of Money at Stake in the Action

The fourth *Eitel* factor requires the Court to weigh the amount of money at stake against the seriousness of Defendant's conduct. *See Cal. Sec. Cans,* 238 F.Supp.2d at 1176; *see also Eitel*, 782 F.2d at 1471–72. "Default Judgment is disfavored where the sum of money at stake is too large or unreasonable in relation to defendant's conduct." *Vogel v. Rite Aid Corp.*, 992 F.Supp.2d 998, 1012 (C.D. Cal. 2014). Here, Defendant's willful failure to disclose his foreign bank account for five consecutive calendar years constituted an egregious violation of United States law and could have subjected him to a penalty of more than $400,000—half the balance of the account at the time of the violation. However, Plaintiff seeks a judgment only of $88,341.16, including late fees and interest. While the amount Plaintiff seeks is significant, the Court would find that in light of the potential amount Defendant could have been required to pay, the amount is reasonable.

4. Possibility of Dispute Concerning Material Facts

The fifth *Eitel* factor requires the Court to consider whether it is likely a dispute exists as to any material facts in the case. *See Eitel*, 782 F.2d at 1471–72. "Where a plaintiff's complaint is well-pleaded and the defendant makes no effort to *properly* respond, the likelihood of disputed facts is very low." *See United States v. Yermian,* No. SACV 15–0820–DOC (RAOx), 2016 WL 1399519, at * 3 (C.D. Cal. Mar. 18, 2016) (emphasis added); *see also Landstar Ranger*, 725 F.Supp.2d at 921. Additionally, upon default, the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true. *TeleVideo Systems Inc.*, 826 F.2d at 917.

Here, the allegations in the Complaint are well-pleaded and straightforward. In response to the Complaint, Defendant mailed unfiled pleadings to the office of counsel for the United States ("Unfiled Pleadings"). In the Unfiled Pleadings, Defendant contends that his "actions were never willful," and that the two year statute of limitations had run out. *See* MDJ at 33. However, Defendant failed to file his answer with the court prior to August 9, 2017—when the Court Clerk entered default. He appears to have attempted to file the materials on September 5, 2017, but because default had already been entered, the Court rejected the filing. *See* Docket No. 16. Once a Court Clerk enters default, a defendant's right to appear in the action or to present evidence is cut off. *Clifton v. Tomb*, 21 F.2d 893, 897 (4th Cir. 1927). The only procedure available to Defendant is to file a motion to set aside the default under FRCP 55(c), and Defendant has failed to file such a motion. O'Connell & Stevenson, *Rutter Group Prac. Guide: Federal Civ. Pro. Before Trial* § 6:43, at 6–10 (The Rutter Group 2017). Accordingly, the facts alleged by Plaintiff were sufficient to establish its claim of a FBAR violation and the fifth factor weighs in favor of granting Plaintiff's Motion for Default Judgment.

5. Possibility of Excusable Neglect

***5** In respect to the sixth *Eitel* factor, the possibility of excusable neglect in the instant case is remote. The underlying reason for this factor is to uphold due process by requiring that all interested parties be given notice reasonably calculated to apprise them of the pendency of the action, and be afforded opportunity to present their objections before a judgment is rendered. *See Philip Morris USA, Inc. v. Castworld Prods., Inc.,* 219 F.R.D. 494, 500 (C.D. Cal. 2003). Here, Plaintiff personally served Defendant with a copy of the Summons and Complaint. *See generally* Docket No. 9. Furthermore, Plaintiff has repeatedly advised and instructed Defendant of his need to file an answer with the Court. Hughes Decl. at ¶¶ 5, 8, 10. Despite such notice, Defendant failed to

file an answer presenting his objections. Therefore, the Court would find that Defendant was provided reasonable notice and that the possibility of excusable neglect is unlikely.

6. Strong Policy Favoring Decisions on the Merits

The seventh *Eitel* factor emphasizes that "cases should be decided upon their merits whenever reasonably possible." *Eitel,* 782 F.2d at 1472. However, "this preference, standing alone, is not dispositive." *Id.* "Defendant's failure to answer Plaintiff's Complaint makes a judgment on the merits impractical, if not impossible." *Cal. Sec. Cans*, 238 F.Supp.2d at 1177. Accordingly, the inability to comply with the strong policy favoring deciding cases on the merits does not preclude the Court from entering default judgment against Defendant.

IV. Plaintiff Is Entitled to a Penalty

Plaintiff's Motion for Default Judgment "must also prove all damages sought in the complaint." *Dr. JKL Ltd. v. HPC IT Educ. Ctr.,* 749 F.Supp.2d 1038, 1046 (N.D. Cal. 2010) (citing *Philip Morris USA, Inc.,* 219 F.R.D. 498). Rule 55 does not require the court to conduct a hearing on damages, so long as it ensures there is an adequate basis for the damages awarded in the default judgment. *Action S.A. v. Marc Rich & Co. Inc.,* 951 F.2d 504, 508 (2d Cir. 1991). "The Court considers Plaintiff's declarations, calculations, and other documentation of damages in determining if the amount at stake is reasonable." *Truong Giang Corp. v. Twinstar Tea Corp.,* No. 06–CV–03594, 2007 WL 1545173, at *12 (N.D. Cal. May 29, 2007).

Under 31 U.S.C. § 5321(a)(5)(A), a civil monetary penalty may be imposed on individuals who fail to file a required FBAR. U.S.C. § 5321(a)(5)(A). Here, Plaintiff sufficiently addressed and established all the elements necessary to demonstrate a violation. Plaintiff seeks to reduce a penalty of $88,341.16[2] to judgment due to Defendant's failure to report a required FBAR and for late payments authorized by 31 U.S.C. § 3717. Accordingly, the Court would find that Plaintiff is as a matter of law entitled to the penalty, and that the amount requested is reasonable.

V. Conclusion

The Court would GRANT Plaintiff's Application for Default Judgment against Defendant and award Plaintiff a total of $88,341.16. However, as for the interest, costs, expenses, and any additional penalties, the Court would allow Plaintiff to enumerate those costs in a supplemental filing.

All Citations

Not Reported in Fed. Supp., 2017 WL 6021420, 120 A.F.T.R.2d 2017-6380

Footnotes

1 "If a foreign account holder 'willfully' failed to report the account on an FBAR, the maximum penalty is increased from $10,000 to the greater of $100,000 or fifty percent of the balance in the account at the time of violation." *Bohanec*, 2016 WL 7167860, at *3 (citing 31 U.S.C. §§ 5321(a)(5)(C), (D)(ii)).

2 Interest and penalties have accrued on the assessed FBAR penalty of $80,043. As of December 2, 2016, the total outstanding balance, consisting of the FBAR penalty, penalties for late payment under 31 U.S.C. § 3717(e)(2), and statutory interest, totaled $88,341.16. 31 U.S.C. § 3717(e)(2); Hughes Decl. ¶ 14, Exh. D.