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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CANDY KELLY, et al.,)	1:05-CV-00118-AWI-SMS
)	
Plaintiffs,)	FINDINGS AND RECOMMENDATION TO
v.)	DENY PLAINTIFF'S MOTION FOR
)	DEFAULT JUDGMENT (DOCS. 59, 61)
EVERETT R. ECHOLS, II, M.D.,)	
an individual, et al.,)	
)	
Defendants.)	
)	
)	

Plaintiffs are proceeding with a civil action in this Court. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rules 72-302(c)(1) and 72-303.

On December 7, 2006, Plaintiff filed a motion for default judgment, including a notice, an application for the judgment, a memorandum of supporting points and authorities, and a request for a prove-up hearing. By separate order the Court has vacated the hearing on the motion because the matter may appropriately be submitted and considered only on the papers.

I. Default Judgment

A court has the discretion to enter a default judgment against one who is not an infant, incompetent, or member of the armed services where the claim is for an amount that is not

1 certain on the face of the claim and where 1) the defendant has
2 been served with the claim; 2) the defendant's default has been
3 entered for failure to appear; 3) if the defendant has appeared
4 in the action, the defendant has been served with written notice
5 of the application for judgment at least three days before the
6 hearing on the application; and 4) the court has undertaken any
7 necessary and proper investigation or hearing in order to enter
8 judgment or carry it into effect. Fed. R. Civ. P. 55(b); Alan
9 Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392 (9th
10 Cir. 1988). Factors that may be considered by courts in
11 exercising discretion as to the entry or setting aside of a
12 default judgment include the nature and extent of the delay,
13 Draper v. Coombs, 792 F.2d 915, 924-925 (9th Cir. 1986); the
14 possibility of prejudice to the plaintiff, Eitel v. McCool, 782
15 F.2d 1470, 1471-72 (9th Cir.1986); the merits of plaintiff's
16 substantive claim, id.; the sufficiency of the allegations in the
17 complaint to support judgment, Alan Neuman Productions, Inc., 862
18 F.2d at 1392; the amount in controversy, Eitel v. McCool, 782
19 F.2d at 1471-1472; the possibility of a dispute concerning
20 material facts, id.; whether the default was due to excusable
21 neglect, id.; and the strong policy underlying the Federal Rules
22 of Civil Procedure that favors decisions on the merits, id.

23 Here, Plaintiff seeks entry of a default judgment against
24 Defendants Everett R. Echols, II, M.D., Tom A. Chapman, Ph.D.,
25 Frank Carlos Hernandez, and Amanda Hernnandez, jointly and
26 severally, in an amount to be determined upon proof. Plaintiff,
27 mother and grandmother of decedents Leisa Kelly and minor Ryan
28 Kelly, respectively, sues for damages for wrongful death based on

1 Defendants' having participated in January 2004 in reviewing on-
2 line questionnaires submitted by decedents, approving
3 prescriptions for them without establishing any doctor-patient
4 relationship, and providing Elavil to decedents pursuant to such
5 prescriptions.

6 It is alleged that Defendants Everett R. Echols, M.D., and
7 Tom A. Chapman, Ph.D., citizens of North Carolina, reviewed and
8 approved the request for Elavil on behalf of RX Medical, a Nevada
9 corporation doing business in Florida; EZ RX did business in New
10 Jersey and shipped the drugs to the decedents. Defendants
11 Hernandez did business in Florida and owned and operated EZ RX
12 and RX Medical. Decedents were suffering severe depression and
13 should not have been prescribed Elavil because of their
14 condition, and the drugs were approved and issued in violation of
15 good medical practice. The complaint filed on February 3, 2006,
16 includes a claim against all Defendants for negligent provision
17 of dangerous and controlled substances without proper medical
18 examinations and analysis of medical requirements, and an alter
19 ego claim against Defendants Hernandez with respect to Defendant
20 EZ RX. Plaintiff alleges that decedents ingested sufficient
21 Elavil to induce their suicide on January 31, 2004. Jurisdiction
22 is based on diversity of citizenship.

23 A. Legal Sufficiency of the Complaint

24 Plaintiff states that she can present uncontroverted
25 evidence establishing the ownership interest of Defendants
26 Hernandez in the pharmaceutical corporations. However, the Court
27 does not take evidence on the liability portion of a case in a
28 proceeding for default judgment.

1 A default judgment generally bars the defaulting party from
2 disputing the facts alleged in the complaint, but the defaulting
3 party may argue that the facts as alleged do not state a claim.
4 Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392.
5 Thus, well pleaded factual allegations, except as to damages, are
6 taken as true; however, necessary facts not contained in the
7 pleadings, and claims which are legally insufficient, are not
8 established by default. Cripps v. Life Ins. Co. of North America,
9 980 F.2d 1261, 1267 (9th Cir. 1992); TeleVideo Systems, Inc. v.
10 Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987).

11 Because claims that are legally insufficient are not
12 established by a party's default, a court in considering an
13 application for default judgment must determine whether the
14 claims upon which a plaintiff seeks a default judgment are
15 legally sufficient. Here, the Court has not been provided with
16 the appropriate authorities pursuant to which to determine the
17 legal sufficiency of the complaint. In a diversity case, the
18 substantive law applied by the federal court is generally state
19 law, and the federal courts generally must follow the conflict of
20 laws rules prevailing in the states in which they sit. Klaxon Co.
21 v. Stentor Electric Mfg. Co., 313 U.S. 487, 496-97 (1941). If
22 state law governs a particular issue in a diversity case, the
23 court must then determine the content of the applicable state
24 law; the decision of the state's highest court is generally the
25 definitive statement of the state's law. Commissioner v. Estate
26 of Bosch, 387 U.S. 456, 465 (1967).

27 Here, Plaintiff cites to the elements of the tort of
28 negligence, but does not cite to any authority therefor. With

1 respect to the doctor-patient relationship and the duties of a
2 physician, Plaintiff cites to substantive law from New York
3 State, Arizona, Pennsylvania, California, and other
4 jurisdictions, but Plaintiff does not examine or inform the Court
5 as to the applicable conflict-of-law rules of California or the
6 appropriate application of those principles. Plaintiff has not
7 established that Plaintiff is entitled to relief because
8 Plaintiff has not informed the Court of the pertinent law
9 pursuant to which Plaintiff's entitlement to relief should be
10 measured.

11 An application for a default judgment qualifies as a motion
12 pursuant to Fed. R. Civ. P. 7(b)(1) and Local Rule 1-101(19), and
13 it should include briefs pursuant to Local Rule 78-230(b). Thus,
14 when seeking a default judgment, a plaintiff should provide the
15 Court with points and authorities containing citations to
16 authority showing that the Plaintiff's claim or claims include
17 allegations of all the necessary elements required for
18 entitlement to relief. It is the party's burden to demonstrate to
19 the Court that under the pertinent law, the Plaintiff's claims,
20 as alleged, are legally sufficient.

21 Likewise, the applicant should supply the Court with all
22 pertinent and necessary legal authority pursuant to which it is
23 appropriate to enter judgment against a particular party based
24 upon the allegations of the party's status, agency,
25 participation, or other alleged basis for liability of the
26 particular party.

27 B. Notice and Damages

28 Plaintiff has filed five complaints in this action.

1 Plaintiff filed an amended complaint after the clerk entered the
2 defaults upon which the desired default judgment is sought to be
3 predicated. Plaintiff has not established what notice of the
4 hearing and what notice of the operative allegations of the most
5 recently filed complaint have been given to the Defendants, and
6 whether or not that notice is sufficient under the governing
7 statutes and rules.

8 Finally, the Court notes that Plaintiff has not produced any
9 evidence concerning damages. Generally, the scope of proceedings
10 on an application for default judgment involves a determination
11 of damages, which Plaintiff must prove by evidence, whether by
12 affidavits where an evidentiary hearing is waived, Davis
13 v.Fendler, 650 F.2d 1154, 1161-62 (9th Cr. 1981), or by evidence,
14 Fed. R. Civ. P. 55(b)(2). Fed. R. Civ. P. 55(b)(2) provides in
15 pertinent part:

16 If, in order to enable the court to enter judgment or to
17 carry it into effect, it is necessary to take
18 an account or to determine the amount of damages or
19 to establish the truth of any averment by evidence or
20 to make an investigation of any other matter, the court
21 may conduct such hearing or order such references as it
22 deems necessary and proper and shall accord a right of
23 trial by jury to the parties when and as required by
24 any statute of the United States.

25 The Court thus anticipates that a party seeking a default
26 judgment will provide the Court with evidence sufficient to prove
27 the amount of any damages sought. The party should also provide
28 the Court with legal authority in support of the measure of
damages sought to be applied by the party. Depending on the
claims made by the plaintiff, this may include informing the
Court of the source of the law governing the measure of damages,
including interest (i.e., federal or state), and providing

1 statutory and case law defining the appropriate measure of
2 damages and method of computation of any interest sought. If a
3 party anticipates providing evidence by testimony instead of by
4 affidavits, the party should inform the Court in advance of the
5 hearing. See Local Rule 78-230(I). Plaintiff has not done so in
6 this instance.

7 C. Previous Attempts to Obtain Compliance by Plaintiff
8 with the Rules of Court and the Orders of the Court

9 The Court notes that Plaintiff previously filed a motion for
10 default judgment on January 18, 2006. On January 25, 2006, the
11 Court directed Plaintiff to file supplemental briefing on the law
12 governing the sufficiency of the complaint, the identity of the
13 appropriate source of the law governing the measure of damages,
14 and the measure of damages.

15 Plaintiff filed a memorandum in support of the motion on
16 February 10, 2006.

17 On February 15, 2006, the Court issued an order in which the
18 Court noted the filing of multiple complaints, including an
19 amended complaint filed after the defaults were entered. The
20 Court stated that the supplemental briefing did not substantially
21 comply with the Court's directions to provide briefing regarding
22 which law governed the controversy, the law regarding the
23 elements of the claims in question and the sufficiency of the
24 claims, or the measure of recoverable damages. The Court warned
25 Plaintiff of the possibility of sanctions, including monetary
26 sanctions and dismissal, pursuant to the Court's inherent power
27 and/or the governing rules of court; the Court also determined
28 that in its exercise of inherent power to control the cases and

1 docket before it in the interest of economy of time and effort
2 for both the Court and the parties, it would vacate the hearing
3 and not re-calendar the motion for hearing and decision until
4 Plaintiff submitted the requested points and authorities needed
5 by the Court to prepare findings and recommendations. The Court
6 stated in pertinent part:

7 1) The hearing set for February 24, 2006, on
8 Plaintiff's motion for default judgment IS VACATED, and
9 Plaintiff's motion IS TAKEN OFF CALENDAR with
10 prejudice; in order for the motion to be put on
11 calendar again, Plaintiff will have to re-notice and
12 re-file the motion; and

13 2) At the time Plaintiff renotices and refiles the
14 motion, Plaintiff shall submit points and authorities
15 with respect to the following:

16 a) What is the operative complaint, which
17 complaint was served on each of the defendants against
18 whom default judgment is sought, whether the most
19 recently filed second amended complaint should be
20 stricken because filed without leave of court, whether
21 in view of amendment the parties against whom default
22 judgment is sought have sufficient notice, and whether
23 the Court has jurisdiction to and should grant a
24 default judgment against a party on a complaint that
25 has been superseded by amendment.

26 b) The legal elements of each claim upon which
27 judgment is sought, including what law governs (i.e.,
28 which state's law if Plaintiff alleges diversity
jurisdiction, etc.), and whether the allegations of the
operative complaint satisfy each of the required
elements and state sufficient claims.

The Court has already once sought briefing on the
issue of the legal sufficiency of the complaint, but
Plaintiff has failed to address which law governs and
has failed to provide points and authorities under the
law Plaintiff claims governs regarding what the
elements of the pertinent claim/s are.

 c) What law governs the measure of damages, and
what types of damages or relief is Plaintiff entitled
to recover on the claim/s stated.

 d) Whether Plaintiff is entitled to judgment
against only some of, and less than all of, the named
defendants, against whom Plaintiff seeks damages
jointly and severally (Application at 2), and on less
than all claims set forth.

(Order of February 15, 2006 at pp. 3-4.)

Minutes of a telephonic status conference on August 21,

1 2006, reveal that Plaintiff failed to appear or contact the
2 Court, which was contrary to the instruction of a minute order of
3 May 22, 2006. The Court set a new telephonic status conference
4 and informed Plaintiff that a failure to comply would result in
5 the case being calendared for dismissal of the action. Minutes of
6 the telephonic conference held on September 14, 2006, after
7 Plaintiff submitted a status report, reveal that one defendant
8 (Qualitest) had been dismissed by Judge Ishii, and then a
9 subsequent complaint against that defendant had been filed and
10 was transferred to the Northern District of Alabama. Plaintiff
11 was to refile noticed motions for default judgment by January 9,
12 2007, or the Magistrate Judge would issue findings and
13 recommendations that Plaintiff suffer terminating sanctions for
14 failure to prosecute.

15 Plaintiff then filed the motion presently before the Court,
16 which does not address the facts or law concerning any notice
17 issues raised by the filing of the amended complaints or the law
18 governing the legal sufficiency of the complaint. No evidence of
19 damages has been submitted. Because the Court has repeatedly
20 informed Plaintiff of the required briefing, and yet Plaintiff
21 has failed to comply with the Court's instructions, the Court
22 concludes that it would be a futile act to seek further briefing.
23 In addition, no new circumstances concerning the Court's
24 resources or the Court's need to proceed expeditiously have
25 arisen since the Court's previous conclusion regarding the
26 importance of counsel's proceeding pursuant to the applicable
27 rules.

28 II. Recommendation

1 Accordingly, it IS RECOMMENDED that Plaintiff's motion for
2 default judgment BE DENIED.

3 This report and recommendation is submitted to the United
4 States District Court Judge assigned to the case, pursuant to the
5 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 72-304 of the
6 Local Rules of Practice for the United States District Court,
7 Eastern District of California. Within thirty (30) days after
8 being served with a copy, any party may file written objections
9 with the Court and serve a copy on all parties. Such a document
10 should be captioned "Objections to Magistrate Judge's Findings
11 and Recommendations." Replies to the objections shall be served
12 and filed within ten (10) court days (plus three days if served
13 by mail) after service of the objections. The Court will then
14 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
15 (b) (1) (C). The parties are advised that failure to file
16 objections within the specified time may waive the right to
17 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
18 1153 (9th Cir. 1991).

19
20 IT IS SO ORDERED.

21 **Dated: February 6, 2007**
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/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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