

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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TOMAS ROBINSON,

Plaintiff,

v.

DIANE FERGOT,

Defendant.

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ORDER

04-C-193-C

Plaintiff Tomas Robinson has filed a “Notice of Hearing of Motion to Reject the Defendant’s Answer in this case. In this document, plaintiff complains that defendants failed to answer paragraphs 38-42 of his complaint. It appears that plaintiff is arguing that because defendants failed to answer paragraphs 38-42, he is entitled to entry of default judgment on these claims. Therefore, I construe plaintiff’s plaintiff’s motion as a motion for entry of default pursuant to Fed. R. Civ. P. 55(a).

Entry of default is appropriate where a defendant who has been served with a complaint fails to plead or otherwise defend against the lawsuit. That is not the case here. Defendant filed her answer on March 31, 2004 (Dkt. #2). When she learned through plaintiff’s motion for entry of default that she had failed to answer plaintiff’s paragraphs numbered 38-42, she discovered that she had received a copy of plaintiff’s complaint with

one page missing. That page contained plaintiff's factual allegations numbered 38-42. Counsel then obtained the missing page and, on April 28, 2004, filed a proposed amended answer curing the defect. Thus, plaintiff is not entitled to entry of default in his favor.

Although defendant must obtain the court's permission to file the amended answer, requests for leave to amend a pleading "shall be granted freely when justice so requires." Fed. R. Civ. P. 15(a). This lawsuit is in its early stages. Plaintiff will not be prejudiced if I allow defendant to amend her answer to respond to paragraphs 38-42 of plaintiff's complaint.

There are two other motions presently before the court: 1) defendant's "Motion for Judgment on the Pleadings Dismissing Plaintiff William Von Flowers"; and 2) William Von Flowers's "Motion for Reconsideration of Order Entered in State Court but not Served on Plaintiff or Defendant." These motions are related. One must be returned unfiled, and the other will be denied as unnecessary.

Some procedural history is helpful to understand what prompted these motions. Plaintiff Tomas Robinson originally filed this action in the Circuit Court for Dane County, Wisconsin on December 16, 2003. At that time, William Von Flowers was named as a co-plaintiff. Von Flowers is barred from filing any papers in the federal courts in the Seventh Circuit until he pays a \$500 sanction to the Court of Appeals for the Seventh Circuit. Von Flowers v. Wisconsin Dep't of Health & Family Servs., No. 01-C-1165 (7th Cir. May 30, 2003). To date, Von Flowers has not paid the sanction.

Defendant removed this case from the Dane County Circuit Court on March 26, 2004. Prior to that date, on January 27, 2004, Dane County Circuit Court Judge Gerald Nichol entered an order dismissing Von Flowers from the action on the ground that the complaint did not include allegations that would provide a legal basis for his participation in the suit. The order shows that a copy was mailed to both plaintiffs and to the Wisconsin Department of Justice on January 27, 2004. Nevertheless, after the action was removed, defendant filed in this court a motion seeking dismissal of Von Flowers on two grounds: that he is barred from proceeding in federal court until he pays the \$500 sanction to the court of appeals, and that his complaint is so barren of factual allegations as to fail to put defendant on notice of what it is she is alleged to have done to violate Von Flowers's constitutional rights.

On April 22, 2004, Magistrate Judge Stephen Crocker held a preliminary pretrial conference in this case. Von Flowers participated in the conference, as did plaintiff Robinson and Assistant Attorney General Jody Schmelzer. At that time, it became clear that none of the parties had seen Judge Nichols's dismissal order. The magistrate judge then advised Von Flowers that if he wanted to appeal the state court's dismissal order, it seemed appropriate for him to file a motion for reconsideration in this court, because with the removal, this court had replaced the Dane County court. This directive actually put Von Flowers in a difficult situation. The sanction order entered against him requires that until he pays the \$500 sanction imposed upon him, the district courts in the circuit are to "return

unfiled any papers submitted either directly or indirectly by or on behalf of Von Flowers.”

Id. Nevertheless, the magistrate judge advised Von Flowers that if he were to file a motion for reconsideration, defendant could have 14 days in which to respond to the motion and Von Flowers would have another 10 days to file a reply.

Because Von Flowers is not permitted to file papers in federal court under the May 30 sanction order, I cannot consider his motion. Even if I could, however, I would deny it. First, there appears to be no valid legal reason to disturb Judge Nichols’s ruling. Moreover, not only is Von Flowers subject in this court to the sanction order entered by the court of appeals, but even if he was not, I would not permit him to participate with another pro se litigant in a “group” action. Instead, I would have severed the case into separate lawsuits in keeping with this court’s policy of disallowing complaints brought by more than one institutionalized person proceeding pro se, a policy instituted because of the many problems inherent in such suits. Von Flowers remains free to file a new lawsuit in Dane County Circuit Court in which he sets out in greater detail his claim against defendant Fergot. If that action were to be removed to this court, then it would become necessary to answer the question Von Flowers raises in his motion for reconsideration, which is whether it is permissible for defendant to remove to this court an action filed by a person who is barred from proceeding in federal court. Until then, however, there is no need to consider the matter.

Because I cannot consider Von Flowers’s motion for reconsideration of Judge

Nichols's order dismissing him from this action, Von Flowers remains dismissed from this lawsuit. Therefore, I will deny as unnecessary defendant's motion for judgment on the pleadings seeking dismissal of Von Flowers.

ORDER

IT IS ORDERED that

1. Plaintiff's motion "to Reject the Defendant's Answer," construed as a motion for entry of default, is DENIED.

2. Defendant's motion to amend the answer is GRANTED. As of this date, the amended answer is considered as the operative answer in this case.

3. Von Flowers's "Motion for Reconsideration of Order Entered in State Court but not Served on Plaintiff or Defendant" is to be returned to Von Flowers unfiled in accordance with the order of the Court of Appeals for the Seventh Circuit dated May 30, 2003.

4. Defendant's "Motion for Judgment on the Pleadings" seeking an order dismissing Von Flowers from this action is DENIED as unnecessary.

Entered this 12th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge