

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

GEORGE H. PETERS,

Plaintiff,

v.

ASTRAZENECA, LP and
PROCTER & GAMBLE DISTRIBUTING
COMPANY,

Defendants.

ORDER

05-C-649-C

Plaintiff George H. Peters, an inmate at the New Lisbon Correctional Facility in New Lisbon, Wisconsin, has filed a motion to strike and a motion for entry of default against the defendants. Both motions will be denied.

Plaintiff notes correctly that when this court denied defendants' motion to dismiss his amended complaint on March 3, 2006, they should have filed a responsive pleading to the amended complaint within ten days of the date the order was entered as required by Fed. R. Civ. P. 12(a)(4)(A). Defendants did not do this. Instead, they moved for summary judgment on April 17, 2006. The motion for summary judgment was filed in accordance with Magistrate Judge Stephen Crocker's preliminary pretrial conference order dated

December 6, 2005. There is no legal basis on which to strike it.

Moreover, entry of default is appropriate under Fed. R. Civ. P. 55 where a party has failed to plead or otherwise defend. The record in this case shows clearly that defendants are defending this lawsuit, despite their failure to file an answer within ten days of the date this court denied their motion to dismiss. Moreover, in Pepper v. Village of Oak Park, 430 F.3d 805 (7th Cir. 2005), the Court of Appeals for the Seventh Circuit refused to remand an appeal so that the defendant could file an answer in an identical situation. In Pepper, the plaintiff had amended her complaint and the defendants moved for summary judgment instead of answering the complaint. In excusing the oversight as a technical misstep, the court noted that the primary role of pleadings in the federal system is to provide notice of the defendant's position with respect to the plaintiff's claims. When a defendant files a motion for summary judgment, he provides plain notice of the issue to be litigated. Id. at 812. In this case, although defendants did not comply with Rule 12 technically, they have not failed to defend so as to make entry of default proper.

ORDER

IT IS ORDERED that plaintiff's motions to strike and for entry of default against defendants are DENIED.

Further, IT IS ORDERED that defendants may have until May 5, 2006, in which to

serve and file an answer to plaintiff's amended complaint.

Entered this 24th day of April, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge