

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

RONALD ROMANELLI,

Plaintiff,

ORDER

v.

07-C-19-C

DALIA SULIENE,
DEPUTY KUHL,
CPT. KUHL and
STEVEN ROWE,

Defendants.

Plaintiff has filed a combination of documents in a packet of written materials titled “Response to Defendants’ Correspondence (including together with motion in limine).” This packet includes documents that I have construed as 1) an answer to defendants’ amended answer; 2) a motion for a scheduling conference; 3) a motion for entry of default against defendant Suliene; 4) two affidavits in support of plaintiff’s claims; and 5) purported documentary evidence.

As an initial matter, I call plaintiff’s attention to Fed. R. Civ. P. 7(b)(2), which requires that each motion a party presents to the court should bear a caption as described

in Fed. R. Civ. P. 10(a). Fed. R. Civ. P. 10(a) provides that in addition to a short description of the particular motion or affidavit (such as “Motion for Entry of Default” or “First Affidavit of Ronald Romanelli”), a caption is to include the name of the court, the title of the action and the file number. By properly captioning his submissions separately, plaintiff will assist the clerk’s office staff in accurately recording his submissions on the court’s docket so that, if any party or the court needs to locate the document at a later time, it can do so readily. In the future, plaintiff is requested to conform his submissions to the requirements of Fed. R. Civ. P. 7.

1. Reply to Defendants’ Answer

In the first few pages of plaintiff’s multi-document submission, plaintiff appears to be replying to the defendants’ amended answer. Fed. R. Civ. P. 12(b) permits defendants to avoid litigation of a case if the allegations of fact in a plaintiff’s complaint, even if accepted as true, would be insufficient to make out a legal claim against the defendants. Under the 1996 Prison Litigation Reform Act, however, this court was required to screen plaintiff’s complaint and dismiss it on its own motion if plaintiff’s claims failed to state a claim upon which relief may be granted. Where, as here, the court determined that there were claims that could proceed, it would be pointless for defendants to move to dismiss plaintiff’s complaint on that ground. Nevertheless, they may assert failure to state a claim

as an affirmative defense in their answer. Affirmative defenses raised in an answer simply preserve the defenses in the event defendants wish to raise them at a later time, such as in a separate motion to dismiss or on appeal. As I told plaintiff when I granted defendants' motion to amend their answer to add an affirmative defense, it is not only unnecessary for a plaintiff to respond to a defendant's answer, Fed. R. Civ. P. 7(a) forbids it unless the court directs a reply to be filed. Because no such order has been made in this case, plaintiff's response to defendants' answer will be placed in the court's file, but no consideration will be given to it.

2. Motion for Scheduling Conference

Under a heading titled "Motion 2," plaintiff asks that a "pretrial hearing" be set and a trial date scheduled. This motion is easily disposed of. It will be denied as unnecessary. This case already has been set for a preliminary pretrial conference, which will occur on May 17, 2007. At that time, the magistrate judge will set a trial date as well as other deadlines for moving this case to resolution.

3. Motion for Entry of Default Against Defendant Suliene

Under a heading titled, "Motion 3," plaintiff asks that default be entered against defendant Dalia Suliene on the ground that she failed to file an a responsive pleading

“within the time allowed.”

Fed. R. Civ. P. 55(a) states:

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

Defendant Suliene did not fail to plead or otherwise defend this lawsuit. The court's records show that defendant Suliene was served with plaintiff's complaint on March 26, 2007. Although her answer was due on April 16, 2007, she did not serve her answer until April 24, 2007, eight days after the deadline. Nevertheless, there is no basis for granting plaintiff's motion for entry of default because defendant Suliene has not failed to plead or otherwise defend against plaintiff's lawsuit.

4. Plaintiff's Affidavits and Exhibits

Included in plaintiff's packet are two affidavits and several pages of purported documentary evidence. There are two problems with these submissions.

First and foremost, there is no motion pending before the court that requires the submission of evidentiary materials. Plaintiff appears to have believed that he could use the documents to prove his entitlement to judgment in his favor against defendant Suliene. Because I have denied plaintiff's motion for entry of default against Suliene, however, there

is no need to consider at this time whether plaintiff has evidence to prove his entitlement to a judgment on the merits of his claim against Suliene.

The second problem is that, even if it were appropriate for plaintiff to attempt to prove his entitlement to judgment on the merits of his claim against defendant Suliene, none of his “evidentiary materials” is admissible. The affidavits do not contain original signatures as they should and the exhibits are not authenticated. Each document is simply a photocopy of the original. For plaintiff’s future information, if he intends to rely on documents to prove matters relating to his claims, the documents must be authenticated. Specifically, each document must be accompanied by the affidavit of someone who testifies on personal knowledge that the document is a true and correct copy of the particular document it appears to be. Alternatively, plaintiff may seek to obtain a stipulation from the opposing parties that the documents are authentic reproductions of the originals. If plaintiff has questions about this process, he is free to raise them at the preliminary pretrial conference to be held tomorrow, May 17, 2007, before United States Magistrate Judge Stephen Crocker.

In sum, plaintiff’s purported exhibits will be held in the court’s file for record purposes only. However, they will not be considered for any purpose in their present form.

ORDER

IT IS ORDERED that

1) Plaintiff's reply to the answer will be placed in the court's file but will not be considered;

2) plaintiff's motion for a scheduling conference is DENIED as unnecessary;

3) plaintiff's motion for entry of default pursuant to Fed. R. Civ. P. 55(a) is DENIED;

and

4) plaintiff's purported exhibits will be held in the court's file for record purposes only.

Entered this 16th day of May, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge