

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

LARRY W. RADER, surviving spouse,
and assignee of the Estate of Diane M. Rader,

ORDER

Plaintiffs,

3:07-cv-00709-bbc

v.

JOHNSON & JOHNSON COMPANY,
MCNEIL-PPC, INC.,
TEVA PHARMACEUTICALS USA, INC.,

Defendants,

and

UNITED GOVERNMENT SERVICES, LLC
(CMS - Medicare hospital),
WISCONSIN PHYSICIANS SERVICE
INSURANCE CORPORATION (Medicare
physicians), and SECURITY HEALTH PLAN
OF WISCONSIN, INC.,

Subrogated Third-Parties.

Plaintiff Larry Rader, who is proceeding without the assistance of a lawyer, filed this case in the Circuit Court for Marathon County, Wisconsin. On December 14, 2007, defendants removed the case to this court, asserting diversity jurisdiction. The case was

assigned to the Hon. John C. Shabaz. However, on January 30, 2008, Judge Shabaz recused himself and the action was assigned to me. Presently before the court is plaintiff's "motion for default judgment against [defendants] Johnson & Johnson and McNeil-PPC, Inc," which I construe as a motion for the entry of default pursuant to Fed. R. Civ. P. 55(a). The motion will be denied.

Rule 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.

Defendants Johnson & Johnson and McNeil-PPC, Inc. filed an answer in this case on December 21, 2007. Plaintiff acknowledges this, but argues that he is nevertheless entitled to judgment in his favor by default because the answer was late. He points out that pursuant to Fed. R. Civ. P. 81(c)(2),

A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

- (A) 20 days after receiving--through service or otherwise--a copy of the initial pleading stating the claim for relief;
- (B) 20 days after being served with the summons for an initial pleading on file at the time of service; or
- (C) 5 days after the notice of removal is filed.

According to plaintiff, defendants Johnson & Johnson and McNeil-PPC, Inc. admit that they

were served with his complaint and a summons on November 26, 2007. Thus, plaintiff calculates that the latest date on which they were to have filed an answer was five days after the December 14 date the notice of removal was filed, or December 19, 2007. Defendants did not file their answer until December 21 which, according to plaintiff, is two days late. He is wrong.

Fed. R. Civ. P. 6(a)(2) says that in computing any time period specified by the rules, intermediate Saturdays, Sundays and legal holidays are excluded when the period “is less than 11 days.” December 14, 2007 fell on a Friday, which means that the five-day period did not begin to run until Monday, December 17. Five days later, on December 21, defendants filed their answer.

Because there is no basis for finding that defendants Johnson & Johnson and McNeil-PPC, Inc. have failed to plead or defend against this lawsuit within the time allowed, there is likewise no basis for granting plaintiff's motion for the entry of default.

Accordingly, IT IS ORDERED that plaintiff's motion for entry of default pursuant

to Fed. R. Civ. P. 55(a) is DENIED.

Entered this 31st day of January, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge