

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

ROBERT F. NICHOLS, II, et al.,     )  
  )  
                          Plaintiffs        )  
  )  
v.    )     Civil No. 98-0227-B  
  )  
LAND TRANSPORTATION                )  
CORPORATION, et al.,                 )  
  )  
                          Defendants        )

***ORDER and RECOMMENDED DECISION***

Defendant Oscar Gonzalez has filed a demand for jury trial, together with a Motion for Default Judgment on his counterclaim. The Court construes the demand for jury trial as a Motion to Amend the Answer to include a demand for jury trial, pursuant to the Court’s Local Rules. D. Me. R. 38. So construed, the Motion is GRANTED WITHOUT OBJECTION, Plaintiffs having included a demand for jury trial in the Complaint. In addition, Defendant Gonzalez moves separately for recusal of the undersigned Magistrate Judge “but only if a jury trial is allowed.” This Motion is MOOT as unnecessary in light of the provisions of 28 U.S.C. section 636(b)(2), under which a jury trial may be referred to a United States Magistrate Judge only upon consent of all parties.

With regard to the Motion for Default Judgment, I hereby recommend the Motion be DENIED, and further, that the counterclaim be STRICKEN for Plaintiff's failure to comply with Federal Rule of Civil Procedure 8(a). Plaintiff's "counterclaim" reads in its entirety:

Motion to Award for Judgement in Bihalf of Defendants

Defendant now come before this honorable court and Motion for Judgement on the counter claim and to award the Defendant (300,000.00) the sum of three hundred thousand dollars plus interest.

Gonzalez Answer at pg. 4 (errors in original). Federal Rule 8(a) requires that counterclaims contain ". . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . .". An entry of default has the effect of establishing as true as a matter of law each of the factual averments of the claim. *Brockton Savings Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 13 (1985).

Usually, Plaintiffs' failure to object to Defendant's Motion would amount to a waiver of objection. D. Me. R. 7(b). In light of the defect in Defendant's counterclaim, however, there is no basis upon which relief could be granted for the default. Further, Plaintiffs were actually under no obligation to respond to a counterclaim which was not clearly labeled as a counterclaim. Fed. R. Civ. P. 7(a). Their failure to file a reply under this circumstance does not entitle Defendant to the entry of default. I therefore recommend the Motion for Default Judgment be

DENIED and the “counterclaim” be STRICKEN for Defendant Gonzalez’s failure to comply with Federal Rule of Civil Procedure 8(a).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated on March 3, 2000.