

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ROBERT M. PRAY in his capacity as)
Trustee of the J&J Trust,)
)
Plaintiff,)
)
v.) 2:10-cv-00394-JAW
)
UNITED STATES OF AMERICA,)
)
Defendant.)

**ORDER ON MOTION FOR DEFAULT JUDGMENT AGAINST
COUNTERCLAIM DEFENDANT KEY BANK**

In this quiet title action, the Plaintiff, a trust, seeks a judgment declaring certain federal tax liens on real property located in Poland, Maine, ineffective and void. The liens were levied by the Internal Revenue Service (IRS) in an attempt to collect a total of \$1,245,019.73 (amount as of July 24, 2012, including interest) in unpaid tax liability from two individual taxpayers, who failed to pay FICA taxes withheld from the wages of employees of their businesses in 1996. The liens are premised on the delinquent taxpayers' ownership of the real property. The individual taxpayers and the trust maintain that the trust is the owner, and that the liens are thus invalid. Although the IRS acknowledges that the trust holds legal title to the property, the IRS has taken the position that it does so as a mere nominee, and that the individual taxpayers are the true beneficial owners.

In response to the Plaintiff's Complaint in this Court, the United States counterclaimed, seeking to enforce its liens and to reduce to judgment its

assessments of federal tax liability against the two individual taxpayers. The United States joined Key Bank as a counterclaim defendant because Key Bank holds or held a mortgage on the property that was executed in 1993. Key Bank has not responded, however, and the Clerk entered its default pursuant to Federal Rule of Civil Procedure 55(a). Before the Court is the United States' motion for a default judgment against Key Bank pursuant to Rule 55(b)(2). The United States seeks a declaration that Key Bank has no right, title, claim, or interest in the real property.

I. PROCEDURAL HISTORY

On September 20, 2012, Robert M. Pray, as Trustee of the J & J Trust (Trust), filed a complaint against the United States of America, seeking an Order declaring certain Internal Revenue Service liens ineffective and void. *Compl.* (ECF No. 1). After a period during which the case was stayed, the case reawakened on July 3, 2012. *Order* (ECF No. 16). On August 2, 2012, the United States answered the Complaint and initiated a counterclaim against Trust and certain other parties, including Key Bank. *United States' Answer and Countercl.* (ECF No. 17). The United States' Counterclaim against Key Bank asserted that Key Bank "has, or may claim, an interest in the Subject Property upon which the United States seeks the enforcement of its liens." *Id.* ¶ 25. On September 10, 2012, the United States filed a Proof of Service that indicated that a summons had been personally served on Key Bank. *Summons in a Civil Action, 2* (ECF No. 26).

After Key Bank did not respond, the United States moved for the entry of Key Bank's default on November 15, 2012. *Def./Countercl. Pl. United States of*

America's Req. to Enter Default of Countercl. Def. Key Bank (ECF No. 36). On November 15, 2012, the Clerk duly entered Key Bank's default pursuant to Rule 55(a). *Order* (ECF No. 38). On January 28, 2013, the United States moved for default judgment against Key Bank under Rule 55(b)(2), seeking a declaration that Key Bank has "no right, title, claim or interest in the real property" that is the subject of this lawsuit. *Mot. for Default J. Against Countercl. Def. Key Bank*, 2 (ECF No. 44) (*Mot. for Default J.*); FED. R. CIV. P. 55(b)(2).

II. DISCUSSION

Under Rule 55(a), the clerk must enter a party's default when the party "has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise." FED. R. CIV. P. 55(a). Although "an entry of default prevents the defendant from disputing the truth of well-pleaded facts in the complaint pertaining to liability," *Remexcel Managerial Consultants, Inc. v. Arlequin*, 583 F.3d 45, 52 (1st Cir. 2009) (quoting *Conetta v. Nat'l Hair Care Ctrs., Inc.*, 236 F.3d 67, 75-76 (1st Cir. 2001)), it is an "interlocutory order—entered in anticipation of a final judgment," *United States v. \$23,000 in United States Currency*, 356 F.3d 157, 163 (1st Cir. 2004), and does not necessarily establish liability or damages. *E.g.*, *Ohio Cent. R.R. Co. v. Cent. Trust Co.*, 133 U.S. 83, 91 (1890) ("if [the allegations] are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainty must be afforded by proof"); *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978) ("facts which are not established by the pleadings . . . or claims which are not well-pleaded, are not binding and cannot support the judgment"); *see also* 10A

CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2688 (3d ed. 1998).

“When an application is made to the court under Rule 55(b)(2) for the entry of a judgment by default, the district judge is required to exercise sound judicial discretion in determining whether the judgment should be entered.” 10A WRIGHT, MILLER & KANE, *supra*, § 2685, at 30. One of the factors courts consider in determining whether to enter a default judgment is “whether the grounds for default are clearly established or are in doubt.” *Id.* at 32-36. Rule 55(b)(2) authorizes the Court to “conduct hearings or make referrals” to, among other things, “establish the truth of any allegation by evidence,” or to “investigate any other matter.” FED. R. CIV. P. 55(b)(2)(C)-(D).

A. The United States’ Legal Entitlement to the Relief Sought

The United States seeks a declaration that Key Bank “has no right, title, claim or interest in the real property” allegedly subject to the federal tax liens. *Mot. for Default J.* at 2. However, the United States did not explain its grounds for seeking such a declaration in its motion for default judgment. *Id.* at 1 n.1 (“The government has not submitted a memorandum of law in support of this motion . . . since no substantive issues of law are presented and the relevant law is cited.”). Notably, the United States has alleged not that Key Bank has no interest in the property, but nearly the opposite: “that it has, or may claim, an interest in the Subject Property upon which the United States seeks the enforcement of its liens.” *Countercl.* ¶ 25. The Counterclaim further alleges that, “[i]n 1993, Beverly Dalton

jointly executed a mortgage on the Subject Property with Arthur C. Dalton, Sr., in favor of Key Bank” and that Arthur C. Dalton, Jr., has made payments on this mortgage since at least 2000. *Id.* ¶¶ 42-43. As the United States’ allegations do not appear to question the existence and validity of Key Bank’s mortgage, the United States must explain why it would be appropriate for this Court to declare that Key Bank lacks any right, title, claim, or interest in the property.

B. Notice

Rule 55(b)(2) mandates that “[i]f the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application for judgment at least 7 days before the hearing.” FED. R. CIV. P. 55(b)(2). In the First Circuit, a party can have “appeared” despite having made no formal presentation or submission to the court. *Key Bank of Me. v. Tablecloth Textile Co. Corp.*, 74 F.3d 349, 353 (1st Cir. 1996). In *Key Bank*, the First Circuit reaffirmed that “a defaulting party ‘has appeared’ for Rule 55 purposes if it has ‘indicated to the moving party a clear purpose to defend the suit.’” *Id.* at 353 (quoting *Muniz v. Vidal*, 739 F.2d 699, 700 (1st Cir. 1984)). The *Key Bank* Court found an “appearance” to have been made where a party’s “informal contacts” with the opposing party—including a letter that commenced settlement negotiations—“demonstrated a clear intent to defend.” *Id.*

In this case, Key Bank has made no formal presentations or submissions to the Court, but it is unclear whether Key Bank has demonstrated a clear intent to

defend by other means, such as through contact with the other parties. Before ordering a default judgment or holding a hearing, the Court will require the United States either to provide written notice to Key Bank pursuant to Rule 55(b)(2) or to file an Affidavit setting forth facts sufficient for this Court to conclude that Key Bank has not demonstrated a “clear intent to defend” as defined in *Key Bank*.

III. CONCLUSION

The Court ORDERS the United States to file a memorandum within seven days of the date of this Order explaining the grounds for its request that this Court order a default judgment declaring that Key Bank lacks any right, title, claim, or interest in the property allegedly subject to the federal tax liens.

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
CHIEF UNITED STATES DISTRICT JUDGE

Dated this 6th day of February, 2013

Plaintiff

ROBERT M PRAY
*in his capacity as Trustee of the J & J
Trust*

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V.

Defendant

USA

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Defaulted Party

KEY BANK

Counter Claimant

USA

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TERMINATED: 03/21/2012

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V.

Counter Defendant

ROBERT M PRAY
*in his capacity as Trustee of the J & J
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Counter Defendant

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Counter Defendant

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