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Assigned Judge: Coughenour

BILL WALKER
PRO SE

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BILL WALKER,
PLAINTIFF,

v.

THE UNITED STATES OF AMERICA,
Defendant

PLAINTIFF'S RESPONSE TO UNITED
STATES' OPPOSITION TO MOTION FOR
DEFAULT JUDGMENT

C. A. No. C00-2125C

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1 Plaintiff, having already cited in detail the Federal Civil Rules
2 and other circumstances involved in his motion for default judgment
3 will not repeat them here. Defendant United States relies on Fed. R.
4 Civ. P. 12(b) as its sole defense whereby it maintains it can ignore
5 all other rules cited by plaintiff in his original brief in support of
6 his motion for default judgment.

7 The obligatory word "shall" which permits defendant United States
8 no option in this matter is used in these rules to indicate a duty on
9 the part of the party so designated which grants no option except
10 compliance.¹ The same obligatory word "shall" is used in Article V and
11 is at the heart of the instant issue before this Court. Here also the
12 word indicates a duty on the part of the party so designated which
13 grants no option except compliance. The two issues are thus identical
14 as is the response of defendant United States. It seeks exception where
15 none is intended either by Court rule or by the Constitution thus
16 transforming the word "shall" from an obligatory duty to a
17 discretionary preference to the benefit of the United States.

18 It is conceded by plaintiff that Fed. R. Civ. 12(b) allows the
19 defendant the right to plead seven different defenses, only one of
20 which defendant asserted.² However nowhere in this rule does it state
21 that defendant United States in employing this rule is relieved of its
22 obligation specified in the summons served on it by plaintiff, Fed. R.
23 Civ. 12(3) or 7(a) which is that defendant United States must answer

¹ E.g., "The United States or an officer or agency thereof *shall* serve an answer to the complaint ... *Within* 60 days after the service upon the United States attorney of the pleading in which the claim is asserted." Fed. R. Civ. P 12 (3) ; "There *shall* be a complaint and an answer." Fed. R. Civ. P. 7 (a); The United States "is required...to serve an answer to the complaint." Portion of summon served on defendant United States.

² Plaintiff wishes it noted therefore under Court rules this denies defendant the right to assert these other defenses at a later date.

1 the complaint filed by the plaintiff within 60 days or be in default.³
2 Indeed the language of Fed. R. Civ. 12(3) leads to the exact opposite
3 conclusion and defendant United States does not assert in its
4 opposition to plaintiff's motion that these two rules in any way
5 conflict.⁴

6 The intent and meaning of the rules are clear: the United States
7 may avail itself of the listed defenses in Fed. R. Civ. 12(b) but this
8 does not relieve it of its burden to satisfy all other Court rules. The
9 defenses asserted in Fed. R. Civ. 12(b) are not considered pleadings.
10 The Court rules specify the United States must *plead* to the complaint

³ The interpretation of Fed. R. Civ. 7(a) is particularly enlightening in this matter.

"The list [referring to "There shall be a complaint and a answer; a reply to a counterclaim denominated as such; an answer to a cross-claim,...a third-party complaint... and a third-party answer."] in Rule 7(a) is exhaustive. Consequently, the following documents—which do not appear in the Rule 7(a) list—are *not* [emphasis in original] "pleadings": a writ, a *motion to dismiss*, (1)[emphasis added] a motion for summary judgment, a response to a motion, a "*suggestion*" under Rule 12(h)(3) of a lack of subject matter jurisdiction, (2)[emphasis added] a brief or memorandum, a notice of appeal, filings in a condemnation proceeding, and a special pre-answer "reports" required of defendants in certain cases, such as prisoner civil rights lawsuits." Federal Civil Rules Handbook, West Publishing Company (1997).

Footnote to the emphasized portion of the above quote is as follows:

(1) Mellon Bank, N.A. v. Ternisky, 999 F.2d 791, 795 (4th Cir. 1993); United States v. Snider, 779 F.2d 1151, 1155 (6th Cir. 1985).

It is also noteworthy to quote Fed. R. Civ. 12(h)(3) in its entirety:

"Whenever it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." (emphasis added).

Clearly, the action of defendant United States in filing a motion asserting lack of jurisdiction of the subject matter falls under the term "or otherwise" and thus its action becomes subject to Fed. R. Civ. 12(h)(3). As such this action fails to satisfy Fed. R. Civ. 7(a).

⁴ Plaintiff assumes the members of the judiciary who wrote these rules studied these matters extensively. Thus, it is illogical to assume that within the same rule these members would create an inherent conflict which by this time, considering the number of amendments to the rules that have evolved over the years, has not been resolved. Therefore, it must be assumed there is no conflict. Hence, *both* rules have effect on the United States, that it is free to assert certain defenses but simultaneously must answer the complaint within a period of 60 days.

1 served on it by the plaintiff within a definite period of time.
2 Therefore, the United States must serve an answer to plaintiff's
3 complaint within 60 days of the complaint being served on the United
4 States Attorney or be found in default.⁵

5 Plaintiff wishes to note for the record that as of the date of
6 the filing of this response to United State's Opposition to Motion For
7 Default Judgment, defendant has still not filed nor served an answer to
8 plaintiff's complaint and thus is clearly in violation of the Court
9 rules cited in plaintiff's brief in support of his default motion.
10 Defendant United States is therefore default in this instant case and
11 consequently plaintiff's motion should be granted.

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⁵ It is clear then that the United States' contention that "plaintiff is not entitled to have the allegations in the Complaint admitted, denied or otherwise answered," (Footnote 1, U.S. Opposition to Motion For Default Judgment) is not supported by the Court rules which demand an answer within a prescribed time frame *regardless* of any other motion made by the defendant.

There can only be one conclusion drawn from the refusal of the United States to answer this complaint: that it knows the position of

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Conclusion

For the reasons set forth above together with the reasons cited in plaintiff's original motion and brief plaintiff respectfully submits United States' Opposition to Motion For Default Judgment must be denied.

Dated this ____ day of February, 2001.

Respectfully submitted,

Bill Walker, plaintiff, pro se

the plaintiff is correct and that in answering the complaint it will have no choice but to acknowledge this fact.