

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

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|-----------------------------|---|------------------------|
| FIFTH THIRD BANK, |) | |
| |) | |
| Plaintiff, |) | |
| v. |) | CIVIL ACTION |
| |) | |
| 1ST CHOICE INSURANCE |) | No. 09-2607-KHV |
| AGENCY, LLC, et al., |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

MEMORANDUM AND ORDER

On December 1, 2009, Fifth Third Bank filed a complaint alleging that defendants were in default on certain loan agreements. On September 30, 2010, Magistrate Judge James P. O'Hara ordered plaintiff to show cause why this case should not be dismissed with prejudice for lack of prosecution. See Order To Show Cause (Doc. #50). This matter is before the Court on the Response Of Plaintiff To Order To Show Cause (Doc. #52) filed October 8, 2010 and plaintiff's motions for entry of default against various defendants.¹

On October 5, 2010, plaintiff filed a notice of voluntary dismissal as to Bryan Koelzer. On October 8, 2010, plaintiff filed motions for entry of default against the remaining seven defendants. Rule 55(a) provides for entry of default as follows:

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

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

¹ Plaintiff's motions are titled motions for entry of default, but seek default judgment. Plaintiff may not proceed directly to default judgment, however, before receiving an entry of default. Sheldon v. Khanal, No. 07-2112-KHV, 2007 WL 2213540, *2 (D. Kan. Aug. 1, 2007). Rule 55 contemplates a two-step process by which a party first receives an entry of default under Rule 55(a) and then applies for default judgment under Rule 55(b). Id.

Plaintiff has properly served Larry Walker Agency & Associates (Doc. #14), HG&H Enterprises, LLC (Doc. #11), Fred Sacco Insurance, Inc. (Doc. #13), Antonio Carl Wicks (Doc. #12), 1st Choice Insurance Agency, LLC (Doc. #31) and The Arizona Insurance Store, LLC (Doc. #15). These six defendants have not entered an appearance in the case. Accordingly, entry of default is appropriate against these defendants.²

IT IS THEREFORE ORDERED that plaintiff has shown good cause why this case should not be dismissed with prejudice for lack of prosecution.

IT IS FURTHER ORDERED that the Motion For Entry Of Default Against Defendant Larry Walker Agency & Associates, LLC (Doc. #53) filed October 8, 2010 be and hereby is **SUSTAINED**. The Clerk is directed to enter default in favor of plaintiff Fifth Third Bank against Larry Walker Agency & Associates, LLC.

IT IS FURTHER ORDERED that the Motion For Entry Of Default Against Defendant HG&H Enterprises, LLC (Doc. #54) filed October 8, 2010 be and hereby is **SUSTAINED**. The Clerk is directed to enter default in favor of plaintiff Fifth Third Bank against HG&H Enterprises, LLC.

IT IS FURTHER ORDERED that the Motion For Entry Of Default Against Defendant Fred Sacco Insurance, Inc. (Doc. #55) filed October 8, 2010 be and hereby is **SUSTAINED**. The Clerk is directed to enter default in favor of plaintiff Fifth Third Bank against Fred Sacco Insurance, Inc.

² Plaintiff *states* that it served All About Insurance 518 LLC shortly after December 1, 2009, but the record does not reflect service of the complaint and summons. On March 17, 2010, Lois Behr attempted to file a pro se answer for All About Insurance, but the Court struck the pleading. **On or before October 29, 2010, plaintiff may supplement the record to show proper service on All About Insurance 518 LLC.** Until plaintiff has an opportunity to supplement the record, the Court declines to rule on plaintiff's Motion For Entry Of Default Against Defendant All About Insurance 518 LLC (Doc. #57) filed October 8, 2010.

IT IS FURTHER ORDERED that the Motion For Entry Of Default Against Defendant Antonio Carl Wicks (Doc. #56) filed October 8, 2010 be and hereby is **SUSTAINED**. The Clerk is directed to enter default in favor of plaintiff Fifth Third Bank against Antonio Carl Wicks.

IT IS FURTHER ORDERED that the Motion For Entry Of Default Against Defendant 1st Choice Insurance Agency, LLC (Doc. #58) filed October 8, 2010 be and hereby is **SUSTAINED**. The Clerk is directed to enter default in favor of plaintiff Fifth Third Bank against 1st Choice Insurance Agency, LLC.

IT IS FURTHER ORDERED that the Motion For Entry Of Default Against Defendant The Arizona Insurance Store, LLC (Doc. #59) filed October 8, 2010 be and hereby is **SUSTAINED**. The Clerk is directed to enter default in favor of plaintiff Fifth Third Bank against The Arizona Insurance Store, LLC.

IT IS FURTHER ORDERED that on or before October 29, 2010, plaintiff may supplement the record to show proper service on All About Insurance 518 LLC.

Dated this 20th day of October, 2010 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge