

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JOHN T. CRUNK, SR., et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Civil No. <u>04-2573</u> M1/P
)	
BDO Seidman, L.L.P., et al.,)	
)	
Defendants.)	
)	

REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION FOR ENTRY OF
DEFAULT JUDGMENT AGAINST DEFENDANTS ESOT RESOURCES, INC. AND
ROLAND THON OR, IN THE ALTERNATIVE, FOR LEAVE TO CONDUCT
DISCOVERY

Before the court is plaintiffs' Motion for Entry of Default Judgment Against Defendants ESOT Resources, Inc. and Roland Thon or, in the Alternative, for Leave to Conduct Discovery. (D.E. 189). The motion was referred to the Magistrate Judge for a report and recommendation. In their motion, plaintiffs contend that defendants ESOT Resources, Inc. and Roland Thon (collectively "ESOT Defendants") were served with the complaint on July 29, 2004 and August 3, 2004, respectively, and that their attorney, Robert L. Moore, filed an answer on September 21, 2004. On July 23, 2007, Moore filed a Motion to Withdraw as Counsel of Record, which was granted on August 9, 2007.¹ (D.E. 160). Since that time, the ESOT

¹This case was stayed from May 24, 2005 through July 26, 2006. (D.E. 113).

Defendants have failed to appear for two conferences with the court, have not provided the court with their updated contact information as evidenced by the numerous court notices that have been returned as "undeliverable," have failed to maintain contact with the court and the parties at least since August of 2007, and have failed to respond to the present motion.

Rule 55 of the Federal Rules of Civil Procedure governs defaults and default judgments. Section (a) of Rule 55 deals with entry of a technical default by the Clerk, and section (b) deals with entry of a default judgment, either by the Clerk or by the court itself. Entry of a technical default under section (a) is different from, and must precede, entry of a default judgment under section (b). See Arango v. Guzman Travel Advisors, 761 F.2d 1527, 1530 (11th Cir. 1985); Atlanta Gas Light Co. v. Semaphore Adver., Inc., 747 F. Supp. 715, 718 (S.D. Ga. 1990). Entry of a technical default by the Clerk is the "first procedural step on the road to obtaining a default judgment," and must be obtained before a default judgment may be granted. Shepard Claims Serv., Inc. v. William Darrah & Assoc., 796 F.2d 190, 193 (6th Cir. 1986); see also United Coin Meter Co. v. Seaboard Coastline R.R., 705 F.2d 839, 844 (6th Cir. 1983); Ortiz v. Lasker, No. 08-CV-6001L, 2008 WL 5110984, at *1 (W.D.N.Y. Dec. 2, 2008); Garrison v. Transunion, No. 08-10859, 2008 WL 4940795, at *1 (E.D. Mich. Nov. 17, 2008); Corsair Memory, Inc. v. Corsair7.com, No. C 08-03460, 2008 WL

4820789, at *2 (N.D. Cal. Nov. 4, 2008); Axact (PVT), Ltd. v. Student Network Res., Inc., No. 07-5491, 2008 WL 4754907, at *1 (D.N.J. Oct. 22, 2008); Hickman v. Burchett, No. 2:07-cv-743, 2008 WL 926609, at *1 (S.D. Ohio April 4, 2008).

In order to obtain an entry of default under Rule 55(a), an application for entry of default must be filed with the Clerk, along with an affidavit or other competent proof of the defendants' failure to plead or otherwise defend the action. The Clerk will examine the application and, if the requirements of Rule 55(a) are met, certify that the defendants are in default. At that time, the plaintiffs may file a motion for default judgment, accompanied by the Clerk's certificate of default. Since the plaintiffs have not obtained the entry of default by the Clerk, their motion for entry of default judgment is premature. Therefore, the court recommends that the plaintiffs' motion be denied without prejudice to refile after entry of default is sought and obtained from the Clerk.

Respectfully submitted,

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

December 15, 2008
Date

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER

APPEAL.