

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND**

**MALCOLM QUERIDO**

v.

**C.A. NO. 10-099 ML**

**ASHBEL T. WALL et al.**

**REPORT AND RECOMMENDATION**

Jacob Hagopian, Senior United States Magistrate Judge

Presently before the Court are motions filed by plaintiff, Malcolm Querido (“Plaintiff”), *pro se*, for (i) entry of default and (ii) entry of default judgment against the named defendants (“Defendants”) (Docket # 14 & 17). Plaintiff urges, pursuant to Rule 55 of the Federal Rules of Civil Procedure, that default and default judgment should be entered due to Defendants’ failure to answer or otherwise defend against the claims in this action. Defendants have objected to the motions (Dockets ## 17 & 22). These matters have been referred to me for preliminary review and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons stated below, I recommend that Plaintiff’s motions be DENIED.

**DISCUSSION**

Defendants were served the Amended Complaint in this action on July 8, 2010 (Docket # 13), and, thus, their response was required on or before August 5, 2010. Fed.R.Civ.P. 12(a). At the time Plaintiff filed the motion for entry of default, Defendants had not responded to the Amended Complaint. However, Defendants subsequently answered the Amended Complaint on September 21, 2010 (prior to the docketing of Plaintiff’s motion for entry of default judgment), denying the allegations made against them (Docket # 15).

Here, although they filed their response late, neither a default nor a default judgment should be entered against Defendants who have now answered the Complaint and are actively defending against this action. *See* Fed.R.Civ.P. 55(a) (default should be entered “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend”); *see also* *Coon v. Grenier*, 867 F.2d 73, 76 (1<sup>st</sup> Cir. 1989) (“actions should ordinarily be resolved on their merits”). Defendants explain in their objection that their response was late due to the press of business and oversight by their attorney. Further, Defendants urge, (i) their delay in responding to the Amended Complaint was not willful, but was based on mistake of counsel,

(ii) they have a meritorious defense against these allegations, and (ii) the delay of approximately 50 days does not result in any prejudice to the Plaintiff in prosecuting this case (nor has Plaintiff alleged any prejudice in his motion). *C.f. id.* (“In determining whether to set aside a default decree, the district court should consider whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented”).

Accordingly, I recommend that Plaintiff’s motions for default and default judgment be DENIED.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten days of its receipt. Fed.R.Civ.P. 72(b); LR Cv 72(d). Failure to file timely, specific objections to this report constitutes waiver of both the right to review by the district court and the right to appeal the district court’s decision. *United States v. Valencia-Copete*, 792 F.2d 4 (1<sup>st</sup> Cir. 1986)(per curiam); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1<sup>st</sup> Cir. 1980).

/s/ Jacob Hagopian  
Jacob Hagopian  
Senior United States Magistrate Judge  
October 26, 2010