

BENCH MEMO: Grau, et al. v. Union Electric Co., Inc., and Brad W. Bullock, CA 87-610. Motion for Default Judgment.

ATTORNEYS

Pltfs: Jack W. Burtch, Jr. (McSweeney)
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— Entry of Default Judgment.
when Δ fails to
plead or respond to
complaint
— See pp. 2-3 infra
DEFAULT JUDGMENT

Judge, this action comes before you on t
motion for entry of default judgment against
Union Electric Co. and Brad W. Bullock (an of
tric). The motion is made under Rule 55(b),
defendants have apparently never responded or
the Complaint, which was filed Sept. 29, 1987.

submitted affidavits stating that all pleadings have been served
on the defendants. The 20 days in which the defendants were
required to answer has long since expired.

I will here give some background on the case and discuss the
merits of the motion for default judgment.

I. Background

The plaintiffs John Grau and Jack Moore are trustees acting
on behalf of the National Electric Benefit Fund and the partici-
pants and beneficiaries of that Fund. Other plaintiffs include
other funds and their trustees, as well as the Local Union 666 of
the Int'l Brotherhood of Electrical Workers (IBEW) and the Local
666 Benefit Trust Fund.

The plaintiffs brought this action to collect delinquent
contributions owed to the multiemployer benefit trust funds, and
for breach of a collective bargaining agreement. The defendants
allegedly have not made the contributions they owe to the funds,

nor have they filed the financial reports required by the collective bargaining agreements. The action is for injunctive relief and damages, pursuant to various sections of ERISA and the Labor Management Relations Act (LMRA). See 29 U.S.C. §§ 1132, 1145; 29 U.S.C. § 185.

The plaintiffs have submitted affidavits proving service of all pleadings on the defendants, and stating that no answer or other response has been received from the defendants. Plaintiffs counsel, Jack Burtch, informs me that he spoke to the defendants by telephone on Friday, December 11. They are aware of the case and the hearing set for this Monday morning. It seems fairly likely that they will appear, but no one is certain.

The plaintiffs request judgment for all delinquent payments, and an order enjoining the defendants to comply with the agreements, which require the filing of monthly payroll records. They also seek judgment "in the amount due under the applicable agreements, including all liquidated damages, penalties and interest, plus all such amounts as set out in ERISA, 29 U.S.C. § 1001 et seq., through the date of judgment." Finally, they seek to recover their reasonable attorneys fees and costs, pursuant to 29 U.S.C. § 1132(g)(2).

II. Discussion

Rule 55(b)(2), Fed.R.Civ.P., governs the entry of default judgments by a court. Much of Rule 55(b)(2) is inapplicable to the present case, but in its final sentence it states as follows:

If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper, and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

Therefore, you have the power to conduct any evidentiary hearings necessary to render a final judgment of damages or injunctive relief. This may well be necessary, especially since the plaintiffs ask for certain "amounts due under the agreements," without specifying what those amounts are. The plaintiffs also ask that you order the defendants "to disgorge any and all profits they have made from the misuse of assets which should have gone to the plaintiffs and to apply those profits to the plaintiffs." To determine what these profits are, if any, you will need to hold some kind of hearing.

The delinquent amounts owed to the Funds are spelled out in the memo in support of the motion. They total some \$10,406.22. The plaintiffs have also filed an affidavit in support of their statutory claim for attorneys' fees and costs.

It is clear that you have the authority to enter a default judgment against the defendants. Entry of a default judgment under Rule 55(b) is appropriate where the defendant has failed to plead or otherwise defend the action. Music City Music v. Alfa Foods, Ltd., 616 F.Supp. 1001 (E.D.Va. 1985) (Warriner, J.). And where the amount of damages sought is not a sum certain, you may determine the damages in a hearing after the entry of judgment. See Music City Music, 616 F.Supp. at 1002.

The plaintiffs' request for attorneys's fees and costs is authorized by ERISA. Section 502(g)(2) of ERISA; codified at 29 U.S.C. § 1132(g)(2), states that in any action to enforce §1145 (of Title 29), in which a judgment in favor of a plan is awarded, "the court shall award the plan . . . (D) reasonable attorney's fees and costs of the action, to be paid by the defendant." This section also authorizes the court to award the unpaid contributions, interest on the unpaid amounts, and the greater of the interest on the unpaid amounts or the liquidated damages provided for under the plan. A copy of the section is attached hereto.

So, if you enter judgment in favor of the funds, you should award costs and a reasonable attorneys' fee as well. However, the affidavit filed by the plaintiffs' lawyer is deficient in detail; all it shows is blocks of time allegedly spent by several attorneys, and the billing rates set forth for each attorney. I believe you need a more detailed, specific brief on the time spent, showing exactly what work was done, and by whom, for each amount of time alleged. See Music City Music v. Alfa Foods, 616 F.Supp. at 1004 (E.D.Va. 1985) (requiring more detail in brief for proof of attorneys fees).

The affidavit currently seeks \$1,367.49 for costs and fees.

Finally, Judge, here are the delinquent payments due and owing to the various funds and Local 666, according to the plaintiffs, as of the date of the motion:

National Electrical Benefit Fund	\$ 1,037.45
NECA Retirement Plan	456.94
Local Union 666, IBEW	662.69
Richmond Electricians, JAF	251.55
Southern Electrical Retirement Fund	1,944.13
Local 666, Benefit Trust Fund	<u>6,053.46</u>
Total	\$10,406.22

The other amounts sought (the profits and liquidated damages under the contract) are not set forth, and will have to be determined after some kind of hearing.

DRW, 12/11/87