

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

**Stephen S. Kuhn, II,**

**Plaintiff,**

**v.**

**Case No. 04-2229-JWL**

**Ameriquest Mortgage Company,**

**Defendant.**

**MEMORANDUM & ORDER**

Plaintiff filed suit against defendant, his former employer, alleging that defendant terminated his employment on the basis of his gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. After defendant failed to answer or otherwise respond to plaintiff's complaint, the clerk of the court entered a default against defendant. Thereafter, plaintiff filed a motion for default judgment against defendant (doc. #8) and defendant filed a motion to set aside the clerk's entry of default and to extend its time to plead (doc. #11). In support of its motion, defendant submitted as an exhibit its motion to dismiss plaintiff's complaint that it intends to file if given leave to do so. Plaintiff has filed a motion for an order denying the motion to dismiss (doc. #19).

The court referred these three motions to Magistrate Judge O'Hara for report and recommendation. On August 26, 2004, Judge O'Hara issued his report and recommendation, recommending that the court deny plaintiff's motion for default judgment; grant defendant's motion to set aside the clerk's entry of default and for an extension of time to plead; and deny as premature plaintiff's motion for an order denying defendant's motion to dismiss. Thereafter,

plaintiff filed a timely objection to the report and recommendation (doc. #24) which is presently before the court. As explained below, the court overrules plaintiff's objection and adopts in its entirety the report and recommendation of Judge O'Hara.

The standards this court must employ when reviewing objections to the report and recommendation are clear. *See* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72. Only those portions of the report and recommendation that have been specifically identified as objectionable will be reviewed. *See Garcia v. City of Albuquerque*, 232 F.3d 760, 766-67 (10th Cir. 2000). The review of those identified portions is de novo, and the court must "consider relevant evidence of record and not merely review the magistrate judge's recommendation." *See Griego v. Padilla*, 64 F.3d 580, 584 (10th Cir. 1995).

Judge O'Hara's report and recommendation accurately summarizes the record in this case and, thus, the court need not reiterate those details here. Suffice it to say, plaintiff served a copy of the complaint and summons on one of defendant's branch managers, who apparently neglected to inform defendant that he had accepted service of these documents. Defendant did not discover that service had been made on the branch manager (although it was aware that a complaint had been filed) until plaintiff contacted defendant and advised defendant that it was in default and that he had served the branch manager. Judge O'Hara recommends that the entry of default be set aside on the grounds that defendant's default was not willful; that defendant has presented a defense to the complaint that appears meritorious (defendant's proposed motion to dismiss is based on an arbitration agreement purportedly signed by plaintiff); and plaintiff will suffer no prejudice if the court vacates the entry of default.

Plaintiff has set forth several specific “objections” to Judge O’Hara’s report and recommendation. These objections are, in essence, arguments in support of plaintiff’s motion for default judgment, many of which were expressly considered by Judge O’Hara in his report. For example, plaintiff contends that the entry of default should not be set aside because defendant “could have made a very easy phone call” to the clerk’s office to ascertain whether service had been obtained. As Judge O’Hara noted in his report, while it may have been prudent for defendant to investigate the service issue further, defendant’s failure to contact the clerk’s office does not demonstrate that defendant acted in bad faith and does not demonstrate that the default was willful. Similarly, plaintiff urges that the entry of default should not be set aside because defendant had access to an on-line system called “CourtLink” through which, according to plaintiff, defendant could have learned that it had been served. There is no evidence in the record, however, that such information is available from the CourtLink service. In fact, the record reveals only that CourtLink is a subscription service that alerts a company that a complaint has been filed against it. Nonetheless, even assuming defendant could have ascertained the information from CourtLink, its failure to do so does not show that the default was willful.

Plaintiff next contends that the entry of default should not be set aside because the agent who was served, David Dingman, “knew the process to follow when served with any court documents,” and yet willfully ignored this protocol and refused to forward the documents to the appropriate persons. According to plaintiff, Mr. Dingman, the relevant decisionmaker in this case, declined to forward the complaint and summons to the appropriate persons because, as the decisionmaker in the case, he was “in the wrong” and his “character and integrity were already in

question” by virtue of previous litigation against defendant. As Judge O’Hara reasoned, however, regardless of the reasons why Mr. Bingman declined to forward the summons and complaint to the appropriate corporate representatives, there is no dispute that the appropriate persons had no knowledge of service and that, as soon as the appropriate persons learned that service had been made, defendant responded quickly. In other words, even assuming that Mr. Dingman willfully withheld the complaint and summons from the appropriate persons, there is no suggestion that defendant’s default was willful.

Plaintiff also maintains that the court should reject Judge O’Hara’s report and recommendation and refuse to set aside the entry of default because defendant is only participating in this case because plaintiff called defendant’s human resources department and advised defendant about the entry of default. In other words, if not for plaintiff, then defendant would still not know that it had been served and plaintiff would have obtained a default judgment. Judge O’Hara rejected this “fairness argument” and concluded that plaintiff had not shown any prejudice “beyond having to litigate this case on the merits, rather than prevailing in his case by default.” Again, the court agrees with Judge O’Hara that plaintiff has not shown prejudice sufficient to deter the court from setting aside the entry of default.

Plaintiff’s remaining two arguments seem unrelated to the default issue. Plaintiff contends that defendant, knowing that plaintiff is proceeding pro se, is attempting to “wear down” plaintiff with the filing of motions and responses. He further complains that he has been trying to settle this case since November 2003, that defendant had no interest in settling the dispute and never “offered any type of arbitration” and now is contending that the case is subject to arbitration and

is “motioning the court to force the arbitration.” These arguments have no bearing on whether the entry of default should be set aside and, thus, the court rejects these arguments.

**IT IS THEREFORE ORDERED BY THE COURT THAT** plaintiff’s objection to the report and recommendation of Judge O’Hara (doc. #24) is overruled and the report and recommendation is adopted in its entirety. Specifically, plaintiff’s motion for default judgment (doc. #8) is denied; defendant’s motion to set aside the clerk’s entry of default and for an extension of time to plead (doc. #11) is granted; and plaintiff’s motion for an order denying defendant’s motion to dismiss (doc. #19) is denied without prejudice to refile once defendant’s motion to dismiss is actually filed. Defendant is directed to file its answer or other responsive pleading within 10 days of the date of this order.

**IT IS SO ORDERED** this 28<sup>th</sup> day of September, 2004.

s/ John W. Lungstrum \_\_\_\_\_  
John W. Lungstrum  
United States District Judge