

does not state whether he is referring to MERS, GMAC dba Ditech, First American Title, or Pioneer Title specifically) have failed to comply with I.C. § 45-1602 (Contract Notice under the Consumer Foreclosure Protection Act), I.C. § 45-1505 (Foreclosure of Trust Deeds), and 15 U.S.C. §§ 1601, *et seq.* (Truth in Lending Act). On June 8, 2009, this Court entered its Order Dismissing First American Title pursuant to I.R.C.P. 12(c)(motion for judgment on the pleadings). On September 19, 2009, this Court denied Bensen's motion for default (presumably brought against all named defendants, although Bensen's motion is unclear) and granted GMAC dba Ditech and MERS' motion to dismiss.

Bensen purported to serve defendant Pioneer Title Company (Pioneer) on May 15, 2009. On September 15, 2009, Bensen filed his Motion for Default against Pioneer. On September 30, 2009, Bensen filed his Amended Motion for Judgment of Default against Pioneer. On May 4, 2010, Bensen filed another Motion for Default on Pioneer. Bensen noticed his motion for oral argument on May 20, 2010. This matter is not yet set for trial.

Memorandum Decision and Order Denying Plaintiff's Motion for Judgment of Default of Defendant Pioneer Title Company, pp. 1-2.

On May 20, 2010, this Court denied Bensen's motion for default against Pioneer Title due to his failure to properly serve Pioneer Title. On April 15, 2011, Bensen filed the motion for judgment of default currently before the Court. On April 21, 2011, Pioneer Title filed a notice of appearance, motion to dismiss under I.R.C.P. 12(b)(6), and a motion to shorten time on the hearing. At hearing on the matters, held May 3, 2011, the Court denied the motion to shorten time and determined both Bensen's motion for default and Pioneer's motion to dismiss would be heard on July 25, 2011.

On July 25, 2011, counsel for Pioneer, Ben Slaughter, appeared telephonically. Bensen failed to appear in person or telephonically.

II. STANDARD OF REVIEW.

The Idaho Supreme Court and Court of Appeals agree that the decision as to whether to enter default judgment is a matter of discretion for the trial court.

Mastrangelo v. Sandstrom, Inc., 137 Idaho 844, 849-850, 55 P.3d 298, 303-304 (2002);

Johnson v. State, 112 Idaho 1112, 1114, 739 P.2d 411, 413 (Ct.App. 1987) (comparing I.R.C.P. 55 to Fed.R.Civ.P. 55); see also *Clear Springs Trout Co. v. Anthony*, 123 Idaho 141, 143, 845 P.2d 559, 561 (1992).

A grant of a motion for dismissal under Rule 12(b)(6) is reviewed under the *de novo* standard. *Taylor v. McNichols*, 149 Idaho 826, 832, 243 P.3d 642, 648 (2010).

When this Court reviews an order dismissing an action pursuant to I.R.C.P. 12(b)(6), we apply the same standard of review we apply to a motion for summary judgment. After viewing all facts and inferences from the record in favor of the non-moving party, the Court will ask whether a claim for relief has been stated. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims.

Losser . Bradstreet, 145 Idaho 670, 672-73, 183 P.3d 758, 760-61 (2008) (internal citations omitted).

III. ANALYSIS.

In its Decision and Order, the Court set forth the requirements for proper service of a corporation pursuant to Idaho Rule of Civil Procedure 4(d)(4). The Court went on to list the Boise address of Pioneer Title's agent for service of process, the same individual who serves as President. May 20, 2010, Memorandum Decision and Order Denying Plaintiff's Motion for Judgment of default of Defendant Pioneer Title Company, p. 3. Bensen, however, *again* moves this Court for an Order of default against Pioneer Title as:

Pioneer [T]itle Company was duly and justly served true and correct copies of civil suite [sic] by Phill Thompson on March 30th of 2009 it was served to Peggy Canus who identified herself to Mr. Thompson as an officer of Pioneer Title Company, said service was at 100 Wallace Coeur d'Alene Idaho...

Motion for Judgment of Default, p. 1. Bensen has not set forth any evidence to indicate he properly served Pioneer Title pursuant to the Idaho Rules of Civil Procedure.

Nonetheless, Pioneer Title has appeared in this matter, having filed a Notice of Appearance on April 21, 2011. Pioneer does not purport to appear specially, but did file its Motion to Dismiss and supporting materials on the same date as its Notice of Appearance. Pioneer Title argues dismissal under I.R.C.P. 12(b)(6) is appropriate because Bensen's Complaint does not contain any allegations relating to Pioneer Title. Defendant Pioneer Title Company's Memorandum in Support of Motion to Dismiss, p. 2. Bensen's Complaint, filed March 30, 2009, alleges the Notice of Trustee's Sale and attendant paperwork he received on or about March 14, 2009, failed to comply with I.C. § 45-1602 (Contract Notice under the Consumer Foreclosure Protection Act), I.C. § 45-1505 (Foreclosure of Trust Deeds), and 15 U.S.C. §§ 1601, *et seq.* (Truth in Lending Act). Complaint, p. 2. Bensen does not set forth specific allegations as to each named defendant. On September 17, 2009, this Court granted GMAC's and MERS' motions to dismiss in part because neither of those parties owed Bensen any fiduciary duty.

Because Bensen makes no specific allegations against Pioneer Title, and because Bensen failed to respond to Pioneer Title's motion to dismiss, there is no claim for relief by Bensen currently before the Court. Additionally, Bensen's failure to properly serve Pioneer precludes this Court from granting Bensen's motion for default.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, this Court must **deny** Bensen's motion for default and **grant** Pioneer Title's motion to dismiss.

IT IS HEREBY ORDERED Bensen's Motion for Default is DENIED.

IT IS FURTHER ORDERED Pioneer's Motion to Dismiss is GRANTED.

Entered this 1st day of August, 2011.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Brian Bensen
1895 E. 12th Ave.
Post Falls, ID 83854

Lawyer

Fax #

W. Ben Slaughter

208 331-1529

Jeanne Clausen, Deputy Clerk