

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

**LIGHTING SCIENCE GROUP
CORPORATION,**

Plaintiff,

v.

Case No: 6:16-cv-680-Orl-37GJK

**ENERGY EFFICIENT LIGHTING
COMPANY LIMITED,**

Defendant.

ORDER TO SHOW CAUSE

This matter comes on for consideration sua sponte upon a review of the docket in this case. The case presents an interesting procedural history. On April 21, 2016, pursuant to 35 U.S.C. § 271, *et. seq.*, Plaintiff filed a complaint (the “Complaint”) against the Defendant alleging willful patent infringement of three patents – the ‘518, ‘918, and ‘844 Patents (collectively, the “Patents”) – owned by Plaintiff. Doc. No. 1 at 1-8. On April 26, 2016, Plaintiff mailed a copy of the Complaint and a Waiver of the Service of Summons (the “Waiver”) to Defendant. Doc. Nos. 14; 17 at ¶ 2; 19 at ¶ 3.

On June 20, 2016, Plaintiff filed an amended complaint (the “Amended Complaint”) against Defendant, alleging only direct infringement and narrowing the claims at issue with respect to the Patents. Doc. No. 13 at 1-8. The Eleventh Circuit has held that an amended pleading supersedes the original pleading. *Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241, 1243 (11th Cir. 2007). In *Pintando*, 501 F.3d at 1243, the Eleventh Circuit explained:

As a general matter, “[a]n amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader’s averments against his adversary.”

Dresdner Bank AG, Dresdner Bank AG in Hamburg v. M/V OLYMPIA VOYAGER, 463 F.3d 1210, 1215 (11th Cir. 2006) (citation and quotation omitted); *Fritz v. Standard Sec. Life Ins. Co.*, 676 F.2d 1356, 1358 (11th Cir. 1982) (“Under the Federal Rules, an amended complaint supersedes the original complaint.”). In this case, once the amended complaint was accepted by the district court, the original complaint was superceded [sic]. . . .

Id. Thus, on June 20, 2016, when the Amended Complaint was filed, the Complaint was abandoned and superseded. *Id.*

On June 22, 2016, Defendant executed the Waiver for the Complaint, which Plaintiff filed on June 23, 2016. Doc. No. 14. The Waiver was signed by a corporate representative of the Defendant and provides that Defendant has received a copy of “the complaint,” waives service thereof, and shall have sixty (60) days from April 26, 2016, to file a response. Doc. No. 14. On its face, the Waiver appears to apply to the Complaint, which was abandoned prior to Defendant’s execution of the Waiver, because the Waiver states the Defendant was sent copy of the complaint on or about April 26, 2016. Doc. No. 14. Yet, the Amended Complaint was not filed until June 20, 2016, nearly two (2) months later. Doc. No. 13.

The Amend Complaint does not contain a Certificate of Service. Doc. No. 13 at 1-8; *see* Fed. R. Civ. P. 5(d)(1) (requiring a certificate of service for all papers filed after the complaint). In subsequently filed documents, Plaintiff asserts a copy of the Amended Complaint was “timely delivered to [Defendant].” Doc. No. 19 at ¶ 4 (declaration of Plaintiff’s counsel). Yet, Plaintiff also alleges that “[o]n June 23, 2016, counsel for [Defendant] accepted service of the Amended Complaint.” Doc. No. 17 at ¶ 4. Plaintiff has provided a June 23, 2016 email from Justin Miller, Esq., who purportedly represents Defendant. Doc. No. 19-1 at 2.¹ Mr. Miller’s email states that he represents the Defendant, he has “received and reviewed the amended complaint,” he is

¹ Mr. Miller has not formally made an appearance in this action on behalf of Defendant.

attaching a signed waiver of summons, and he inquires about “pre-answer settlement discussions.” Doc. No. 19-1 at 2. Thus, although Mr. Miller received the Amended Complaint, the record does not contain a waiver of service from Defendant as to the Amended Complaint and nothing suggests Mr. Miller represents the Defendant in this action. *Id.* Accordingly, it is unclear on what basis Defendant was properly served with the Amended Complaint.

To date, Defendant has not filed a response to the Amended Complaint and has not otherwise appeared. *See Rogers v. Harford Life and Acc. Ins. Co.*, 167 F.3d 933, 938 (5th Cir. 1999) (“Thus, like accepting formal service of process, executing a waiver of service of process does not constitute an appearance for purposes of Rule 55(b)(2).”). On July 27, 2016, Plaintiff filed a motion for entry of Clerk’s default with respect to the Amended Complaint. Doc. No. 15 at 2. On July 28, 2016, pursuant to Rule 55(a), Federal Rules of Civil Procedure, the Clerk entered default against Defendant. Doc. No. 16.

On August 10, 2016, Plaintiff filed a motion for default judgment (the “Motion”), a separate memorandum of legal authority in support of the Motion, and a declaration from Plaintiff’s counsel in support of the Motion. Doc. Nos. 17-19. In the Motion and affidavit, Defendant states: “[o]n June 23, 2016, counsel for [Defendant] accepted service of the Amended Complaint, and returned the Waiver . . . which was filed on the same day.” Doc. Nos. 17 at ¶ 4; 19 at ¶ 5. Citing Rule 15(a)(3), Federal Rules of Civil Procedure, Plaintiff maintains that Defendant had until July 26, 2016 to file a response to the Amended Complaint. Doc. No. 17 at ¶ 5.

Rule 15(a)(3), Federal Rules of Civil Procedure, provides “any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.” *Id.* Assuming

arguendo, Defendant was properly served with the Amended Complaint on June 23, 2016, then, pursuant to Rule 15(a), Federal Rules of Civil Procedure, Defendant's deadline to file a response would be July 11, 2016. *See* Fed. R. Civ. P. 15(a)(3) (response due within 14 days); Fed. R. Civ. P. 6(d) (3 days are added for mailing). It is unclear how Plaintiff determined that Defendant had until July 26, 2016, to file a response to the Amended Complaint if service was properly perfected on June 23, 2016.

Based on the foregoing, it appears the Amended Complaint is an improper pleading because it fails to contain a certificate of service, the Amended Complaint has not been formally served on Defendant, and no waiver of service has been executed with respect to the Amended Complaint. For example, the Waiver is clearly addressed to the Complaint, which Plaintiff abandoned before Defendant executed the Waiver. If the Waiver was intended to apply to the Amended Complaint, it could not have been sent to the Defendant until June 20, 2016, the date the Amended Complaint was filed. Moreover, if Defendant executed a waiver with respect to the Amended Complaint on June 23, 2016, a response would not be due until August 19, 2016. *See* Doc. No. 14 (providing Defendant with 60 days from the date the Waiver was sent to file a response). Thus, there are substantial questions as to whether the Amended Complaint should be stricken and Clerk's entry of default should be vacated. Plaintiff has not addressed any of these issues. Therefore, Plaintiff will be given an opportunity to do so. Accordingly, Plaintiff will be directed to show cause in writing why the Amended Complaint should not be stricken and the Clerk's entry of default should not be vacated.

Based on the foregoing, it is hereby **ORDERED** that:

1. **On or before August 30, 2016**, Plaintiff shall **SHOW CAUSE IN WRITING** why the Amended Complaint should not be stricken and the Clerk's entry of default should not be vacated;
2. In its written response, Plaintiff shall provide a detailed memorandum of law and factual arguments addressing:
 - a. Why the Amended Complaint (Doc. No. 13) should not be stricken for failing to contain a certificate of service. *See* Fed. R. Civ. P. 5(d)(1);
 - b. Why the Waiver (Doc. No. 14) should not be deemed void since it was executed two (2) days after Plaintiff abandoned the Complaint;
 - c. Why the Waiver (Doc. No. 14) is applicable to the Amended Complaint since the effective date of the Waiver is nearly two months prior to date the Amended Complaint was filed;
 - d. Assuming *arguendo*, the Waiver applies to the Amended Complaint, why Defendant should not have sixty (60) days from June 20, 2016, to file a response to the Amended Complaint;
 - e. The precise method of delivery and/or service of the Amended Complaint, including whether Mr. Miller's receipt and review of same operates as proper service on the Defendant; and
 - f. Why should Plaintiff not be required to serve the Amended Complaint under Rule 4 or obtain a new waiver of service from Defendant; and
3. Failure to respond to this order in the time provided or failure to address any of the issues set forth above may result in the striking of the Amended Complaint and setting aside the Clerk's entry of default.

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