

STATE OF NORTH CAROLINA
COUNTY OF DARE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 568

BODIE ISLAND BEACH CLUB
ASSOCIATION, INC., et al.,
Plaintiffs

v.

DON WRAY; PENNY WRAY;
JESSICA SMITH; DAVID R. DIXON;
STEPHEN R. SMITH; TOM FEIST;
SEA WRAY, LLC; CROC, LLC and
SRS NORTH CAROLINA PROPERTIES,
LLC

Defendants

**ORDER ON MOTION FOR LEAVE
TO AMEND ANSWER**

THIS CAUSE, designated a complex business case by Order of the Chief Justice of the North Carolina Supreme Court, pursuant to N.C. Gen. Stat. § 7A-45.4(b), and assigned to the undersigned Special Superior Court Judge for Complex Business Cases, by order of the Chief Special Superior Court Judge for Complex Business Cases, now comes before the court upon Defendants Stephen R. Smith and SRS North Carolina Properties, LLC's Motion for Leave to Amend Answer (the "Motion"), pursuant to the provisions of Rule 15, North Carolina Rules of Civil Procedure ("Rule(s)"). After considering the Motion and the parties' briefs, as discussed *infra*, the court concludes that the Motion should be DENIED with respect to SRS North Carolina Properties, LLC and GRANTED with respect to Stephen R. Smith.

I.

PROCEDURAL BACKGROUND

1. On July 10, 2009, Plaintiffs filed their Complaint against SRS North Carolina Properties, LLC (“SRS”) and Stephen R. Smith (“Smith”), among others.
2. On August 24, 2009, Smith was personally served as the registered agent of SRS and in his individual capacity.
3. By letter dated September 17, 2009 (the “Answer”), Smith answered the Complaint on his own behalf.
4. On November 25, 2009, Plaintiffs served a Motion for Summary Judgment as to Defendant SRS North Carolina Property [sic], LLC.¹
5. On February 8, 2010, Smith and SRS served the Motion for Leave to Amend Answer (the “Motion”).²
6. On February 9, 2010, Smith and SRS served a Proposed Amended Answer.³
7. On February 11, 2010, Plaintiffs served an Objection to Motion to Amend Answer by Defendant SRS North Carolina Property [sic], LLC.⁴
8. The Motion is ripe for determination.
9. On March 3, 2010, Smith and SRS served and electronically filed a Reply in Support of Motion for Leave to Amend Answer.

¹ Plaintiffs’ Motion for Summary Judgment as to SRS was electronically filed on November 30, 2009.

² The Motion was electronically filed on behalf of SRS and Smith separately on March 7, 2010.

³ The Proposed Amended Answer was electronically filed with the Motion on March 7, 2010.

⁴ Plaintiffs’ Objection to Motion to Amend Answer was electronically filed on February 12, 2010.

10. On March 11, 2010, Plaintiffs served and electronically filed a Response to Reply in Support of Defendants Stephen R. Smith and SRS North Carolina Property [sic], LLC's Motion for Leave to Amend Answer.

II.

DISCUSSION

A.

Smith's Motion

11. Pursuant to Rule 15(a), a party may amend its pleading by leave of court and when justice so requires.

12. THEREFORE, the court FINDS and CONCLUDES that the Motion should be granted with respect to Smith.

B.

SRS's Motion

13. In the Motion, Smith states that he believed that the Answer was an answer filed on behalf of himself and SRS.⁵

14. Smith is not an attorney.⁶ Smith is a medical doctor and is deemed to be a sophisticated investor.

15. Smith wholly owns and is the sole managing member of SRS.

16. Smith's Answer was written on personal letterhead. Moreover, Smith signed the letter on his own behalf and did not purport to respond on behalf of SRS.

17. "A corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se*." *Lexis-Nexis v. Travishan Corp.*, 155 N.C.

⁵ Mot. Leave Amend Answer, ¶ 3.

⁶ *Id.*, ¶ 4.

App. 205, 209 (2002). The exceptions to this general rule are not satisfied here. See *Lexis-Nexis*, 155 N.C. App. at 208; *Beard v. Pembaur*, 68 N.C. App. 52, 54-56 (1984).

18. Because SRS did not answer the Complaint pursuant to Rule 12(a)(1) (see also Rule 4(b)), relief pursuant to Rule 15(a), which allows for amendment of pleadings, is not appropriate.

19. THEREFORE, the court FINDS and CONCLUDES that the Motion should be denied with respect to SRS.

C.

Entry of Default

20. Pursuant to Rule 55(a), “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead . . . and that fact is made to appear by affidavit, motion of attorney for plaintiff, or otherwise[,]” an entry of default can be made. The court has concluded, *supra*, that SRS has not filed an answer to the Complaint. Therefore, default may be entered.

21. A trial judge has concurrent jurisdiction with the clerk of court to order an entry of default. See *Ruiz v. Mecklenburg Utilities, Inc.*, 189 N.C. App. 123, 126 (2008).

22. The North Carolina Supreme Court stated that “defaults may not be entered after answer has been filed, even though the answer be late” and “a default should not be entered, even though technical default is clear, if justice may be served otherwise.” *Peebles v. Moore*, 302 N.C. 351, 356 (1981).

23. The court recognizes that SRS may contend that the Proposed Amended Answer submitted with the Motion is an answer and bars entry of default pursuant to *Peebles*, 302 N.C. 351. The court does not find this argument convincing. “The rules

which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity." *Byrd v. Mortenson*, 60 N.C. App. 85, 88 (1982) (citing *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 510 (1971)). Moreover, the North Carolina Court of Appeals found that a defendant's failure to respond after service of summons for a period of several months was not a mere technical error, but rather dilatory. *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 488 (2003). Thus, the court upheld an entry of default "where the evidence show[ed] defendant simply neglected the matter at issue." *Id.* In the case at bar, SRS neglected the matter at issue in failing timely to file a responsive pleading.

24. SRS may argue that Plaintiffs waived their right to entry of default; however, the Plaintiffs filed a motion for summary judgment as to SRS due to the failure of SRS to answer the Complaint. SRS waited two and one-half months before submitting a proposed answer. Based on these facts, the court concludes that the Plaintiffs did not waive their right to entry of default, *see Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 328 (1985), and SRS was on notice of Plaintiffs moving forward in the legal system with their claims against it, *see Dental Ceramic Art, Inc. v. Kwon*, No. COA06-13342007, 2007 N.C. App. LEXIS 1831, at *5 (2007).

25. THEREFORE, acting upon its own motion, the court FINDS and CONCLUDES that default should be entered against Defendant SRS.

III.

CONCLUSION

THEREFORE, based on the findings and conclusions herein, the court ORDERS:

26. The Motion for Leave to Amend Answer hereby is GRANTED with respect to Defendant Stephen R. Smith.

27. The Motion for Leave to Amend Answer hereby is DENIED with respect to Defendant SRS North Carolina Properties, LLC.

28. Upon the court's own motion, default hereby is entered against Defendant SRS North Carolina Properties, LLC.

29. The court will conduct a hearing on Plaintiffs' Motion for Summary Judgment on Tuesday, June 22, at 10:00 am, at the North Carolina Business Court, 225 Hillsborough Street, Suite 303, Raleigh, North Carolina.

This the 14th day of June, 2010.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Special Superior Court Judge for
Complex Business Cases