

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

ERIC BAURLE, M.D., VIRAJ)
PARIKH, M.D., and DIVISION)
STREET LAND PARTNERS, LLC,)

Plaintiffs,)

VS.)

TRAVIS J. KELTY,)

Defendants.)

WITH)

TODD PRESNELL and)
BERTIL WESTIN,)

Interested Parties.)

NF
NO. 16-229-BC

2017 FEB -2 AM 10:15
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.
D.C. & M.

FILED

**MEMORANDUM AND ORDER OF (1) 2/10/17 DEADLINE FOR LLC AND
(2) DEADLINES OF 2/17/17 AND 3/24/17 FOR DEFENDANT KELTY**

After conducting a hearing by telephone on February 1, 2017, the following is ORDERED:

1. The motion of McKellar|Hyde, PLC and Attorneys Hyde, McKellar and Crane to withdraw as Counsel for Defendant Kelty is granted. Additionally, this Order is effective immediately because, in addition to the motion to withdraw, Defendant Kelty has terminated representation by these attorneys. The hearing set for February 17, 2017 on the motion to withdraw is now unnecessary and is removed from that docket.

2. An attorneys' lien filed by McKellar|Hyde, PLC pursuant to Tennessee Code Annotated section 23-2-103 in the amount of \$21,210.50 plus attorneys fees and costs related to the motion to withdraw is noted herein and preserved for future disposition.

3. By February 10, 2017, Division Street Partners, LLC, represented by Attorney Bone, shall produce to all Counsel the LLC's bank statements and financial statements from November 2015 to the present.

4. By February 17, 2017, Defendant Kelty shall file a notice of proceeding *pro se* or notice of appearance of counsel .

5. Should Defendant Kelty fail to timely comply with paragraph 4 above, Counsel for the opposing parties are granted leave to file a proposed order to enter a default judgment under Tennessee Civil Procedure Rule 55.01 with respect to Defendant Kelty's defenses and claims. Authority for a default judgment under these circumstances is provided below.

6. By March 24, 2017, Defendant Kelty's responses to Plaintiffs' discovery shall be served.

7. The deadlines provided above, including but not limited to, paragraph 6, shall not be extended due to Defendant Kelty retaining new counsel or representing himself *pro se*. The reasons are that: Defendant Kelty has previously changed counsel which resulted in some delays in the case; Defendant Kelty has not timely responded to discovery; Defendant Kelty's termination of representation by McKellar|Hyde, PLC has delayed the

case including deposing him and Plaintiff Baurle; and the delay in this case being decided is resulting in very costly fees and/or interest payments.

8. Because there will be no extensions of the above deadlines, Defendant Kelty shall provide any potential new Counsel with a copy of this Order to make them aware of the deadlines and that there will be no extensions.

9. Attorney Hyde shall file with the Court a mailing address for Defendant Kelty and fax number, if any. Attorney Hyde shall deliver a copy of this Order forthwith to Defendant Kelty.

In the event Defendant Kelty determines to represent himself, he shall file and maintain a current mailing address with the Court. *Tomlin v. Baxter*, No. M2014 01746 COA R3 CV, 2015 WL 7749064, at *7 (Tenn. Ct. App. Nov. 30, 2015) (citations omitted) (“[L]itigants have an affirmative duty to notify the clerk of court, and counsel of record, of a new address if it changes during the course of litigation. This applies to pro se litigants and attorneys of record, and a party or their attorney who fails to fulfill this obligation is ‘the author of his own misfortune and cannot be heard to complain that the trial court erred when it proceeded in his absence.’”).


10. Attorney Farringer shall file a notice stating the monthly amount of partnership fees and/or interest which accrue while this case is pending.

11. The authority for entry of a default judgment referred to in paragraph 5 is that Tennessee courts have recognized that the “otherwise defend” language in Rule 55.01 allows

default judgments in situations beyond a simple failure to answer. In particular failure to retain counsel is a sufficient grounds for a default judgment. In *Tomlin v. Baxter*, 2015 WL 7749064 at *20 (Tenn. Ct. App. Nov. 30, 2015), the court upheld the entry of a default judgment on the payment of a note against parties who failed to comply with an order to retain new counsel. The *Baxter* court noted, “Defendants are of the erroneous impression that the failure to file an answer is the only ground for a default judgment. A trial court may enter default judgment against a party that has ‘failed to plead *or otherwise defend*’ the case.” *Id.* at *21 (emphasis in original) (citing Rule 55.01). A similar example is present in *Yearwood, Johnson, Stanton & Crabtree, Inc. v. Foxland Dev. Venture*, 828 S.W.2d 412 (Tenn. Ct. App. 1991), where the court upheld the entry of a default judgment and noted that the failure of the defendant to “get new counsel within the time allowed” was a separate and sufficient grounds for an entry of default. *Id.* at 414. The court also upheld a default judgment in *Myers v. Myers*, 2010 WL 5054424 at *14 (Tenn. Ct. App. Nov. 9, 2010), where the father in a divorce proceeding filed a late answer, delayed in responding to discovery, and delayed in hiring counsel. The *Myers* court took note of the discretion that Rule 55.01 grants a trial court and that determinations made within this discretion must “be upheld so long as reasonable minds can disagree as to [the] propriety of the decision made.” *Id.* at *11 (quoting *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)).

The “failure to plead or otherwise defend” language of Rule 55.01 is also used in Fed. R. Civ. P. 55(a), which governs defaults in federal court. The federal courts interpret the

language consistent with Tennessee in holding that the failure to retain counsel as ordered by the court is sufficient grounds for a default judgement. *See e.g., Eagle Assocs. v. Bank of Montreal*, 926 F.2d 1305, 1310 (2d Cir. 1991) (default judgement was proper when, "The court was confronted by a recalcitrant party who failed to comply with its order to obtain counsel. 'Such cavalier disregard for a court order is a failure, under Rule 55(a), to "otherwise defend as provided by these rules.'"") (citing *Shapiro, Bernstein & Co. v. Continental Record Co.*, 386 F.2d 426, 427(2nd Cir. 1967); *Alameda v. Sec'y of Health, Educ. & Welfare*, 622 F.2d 1044, 1048 (1st Cir. 1980); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 918 (3d Cir. 1992)).



ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: John Farringer IV
Ryan Holt
Lyndsay Smith Hyde
Andrea McKellar
Cassandra Crane
Mark Hammervold
Robert Boston
Samuel Funk
Gil Schuette
Charles Robert Bone

 **MAILED** / *hand*
2/2/17 *pk*