

Background

The adjudication of water rights claims in Sub-areas 4 and 8 of the Zuni River Basin is guided by the Special Master's Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Areas 4 and 8 of the Zuni River Stream System, as amended ("Procedural Order," January 5, 2005, Doc. Nos. 355, 356, 387, 688). The Procedural Order describes in detail how defendants must respond to the consent order(s) proposed by the Plaintiffs and how objections to the proposed consent orders are handled. Specifically, Paragraph III.C.2 of the Amended Procedural Order (No. 387) provides "A Claimant's failure to sign and return a Consent Order or file a form Answer by January 10, 2006, shall be considered grounds for entry of a default order which incorporates the proposed consent order." The January 10 deadline was later extended to August 31, 2006 (Doc. No. 688).

Plaintiffs' Motion for Default Judgment was filed against the Richard Mallery Revocable Trust ("Mallery"), and alleges that Mallery failed either to return a signed consent order or file a form subfile answer by the deadline of August 31, 2006; consequently, Mallery's water rights claims should be adjudicated as set forth in Plaintiffs' proposed consent order.

Schepps outlines the transfers of ownership which occurred in 2007 and 2008: Mallery's land associated with Subfile No. ZRB-1-0058 was purchased in August, 2007, by El Muerto Creek, LLC. Answer Brief, Exhibit B. Schepps then purchased the land from El Muerto Creek in April, 2008. Answer Brief, Exhibit A. Schepps argues now that Mallery's active participation in earlier phases of the adjudication should preclude this Court from entering a default judgment against

Mallery. Answer Brief, 2-3.¹ Schepps acknowledges that while Mallery failed to file the required form subfile answer, Schepps fully intends to “participate in the adjudication process and pursue all water rights that may be located on the property.” Answer Brief, 3.

Schepps further cites The Soldiers and Sailors Relief Act, 50 App. U.S.C. § 521 (2008), as authority for the proposition that Plaintiffs were required to show that Mallery was not a member of the armed forces on active duty before seeking a default judgment. Section 521(a) states expressly that the statute applies only to civil actions in which the defendant has not made an appearance; thus, Schepps cannot benefit from invoking the Act.

Plaintiffs question whether Schepps has in fact established that Schepps is the successor-in-interest to Mallery with respect to the lands and water rights associated with Subfile No. ZRB-1-0058, Reply at 3-4; and argue that even if Schepps is Mallery’s successor-in-interest, Schepps is bound by his predecessor’s exposure to default for his failure to file the requisite form answer. Reply 4- 7.

Discussion

Fed. R. Civ. P. 25(c) states: “If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).” Thus far, no party has filed a motion for substitution pursuant to the rule. Rule 25(c) is a procedural rule, and does not change the substantive rights of the original party or of the transferee. ECLA Enters., Inc. v. Sisco Equip. Rental & Sales, Inc., 53 F.3d 186 (8th Cir. 1995). Moreover, the status

¹ Mallery’s actions include filing an appearance through counsel and attending the consultation session mandated for defendants who disagree with the proposed consent orders (see Procedural Order, II.G and III.B).

of the case does not change. Brook, Weiner, Sered, Kreger & Weinberg. v. Coreq, Inc., 53 F.3d 851, 852 (7th Cir. 1995).

Assuming without deciding that Schepps is Mallery's successor-in-interest with regard to the land and water rights claims associated with ZRB-1-0058, Schepps is bound by Mallery's actions, or in this case, inactions in 2006. *See*, Kloster Speedsteel AB v. Crucible, Inc., 793 F.2d 1565, 1581-2 (Fed. Cir. 1986) (even where no Rule 25 motion is filed, a judgment against an original party binds a successor-in-interest as though the successor had been substituted). A substituted party is bound by actions taken by their predecessors and by orders entered in the case. Educational Credit Mgmt. Corp. v. Bernal (In re Bernal), 207 F.3d 595, 598 (9th Cir. 2000).

The "preferred disposition of any case is upon its merits and not by default judgment." Gomes v. Williams, 420 F.2d 1364, 1366 (10th Cir. 1970). The preference to decide cases on the merits, however, must be balanced with efficient case management. Over the last several years, this Court has adjudicated hundreds of water rights claims, many of them by default judgment. Both consent orders and default judgments which incorporate proposed consent orders bind not only the plaintiffs and the adjudicated defendant, but also the defendant's "successors, representatives, heirs and assigns." Permitting successors-in-interest to re-open adjudicated rights without those individuals having to demonstrate good cause for re-opening the judgment, Fed. Rs. Civ. P. 55(c), 60(b)(6), would be contrary not only to law but to the expeditious conduct of this case.

The determination of successor-in-interest status is a matter of state law. R. J. Enstrom Corp. v. Interceptor Corp., 555 F.2d 277, 282 (10th Cir. 1977). Schepps has the option of moving for a Rule 25(c) substitution, and, if successful, may seek any appropriate remedy available to him.

IT IS ORDERED, THEREFORE, that Plaintiffs' Motion for Default Judgment is GRANTED. Plaintiffs shall submit a proposed order to the Special Master for review.

IT IS SO ORDERED.



UNITED STATES DISTRICT JUDGE