

File Time: 2:31pm  
8/31/20 CS  
Terry S. Fielding  
CLERK OF COURTS

IN THE HIGH COURT OF AMERICAN SAMOA  
LAND AND TITLES DIVISION

DEVELOPMENT BANK OF AMERICAN SAMOA,	)	LT No. 30-18
	)	
Plaintiff,	)	
	)	
v.	)	ORDER ON RENEWED MOTION
	)	FOR JUDGMENT BY DEFAULT
IAKOPO TA'AMU,	)	AND ORDER TO SHOW CAUSE
	)	
Defendant.	)	
	)	
	)	

Before KRUSE, Chief Justice, FA'AMAUSILI, Associate Judge, and MUASAU, Associate Judge.

Counsel: For Plaintiff, Robert Morris III, substituting for Richard deSaulles, William R. Olson, Thomas B. Jones dba RDA Law Firm

**BACKGROUND**

Before us is plaintiff Development Bank of American Samoa's ("DBAS") renewed motion for default judgment. The Clerk's file reveals that on August 29, 2018, DBAS's Complaint on a promissory note, with accompanying Summons form, was filed stamped "Received" by the Clerk's office. The Complaint was signed by counsel Richard deSaulles and the tendered Summons form was routinely executed by the receiving Clerk. A cursory review of the Complaint reveals an allegation at the outset that "Defendant Iakopo Ta'amu ("Ta'amu") is a resident of the State of Nevada, United States," Compl. ¶ 2. We noted further from the file that no action by either party is apparent thereafter except that the Complaint and the executed Summons appears to have been resubmitted to the Clerk's office five months later for "filing"

LT No. 30-18 ORDER ON RENEWED MOTION FOR JUDGMENT BY DEFAULT ORDER TO SHOW CAUSE

Certified to be a true copy of the original on file in the Office of the Clerk of Courts

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on February 19, 2019. The chronology of events indicated from the Clerk's file up to this point suggests that DBAS appears to have overlooked entirely the service of process on Ta'amu (the Nevada resident); there is nothing to suggest that the Complaint and Summons had been served on Ta'amu either personally or through substituted service, pursuant to applicable statute and rules.

Notwithstanding, the Clerk's file next shows that a motion for substitution of counsel was filed on April 30, 2019, proposing the substitution of counsel Robert J. Morris, III for then counsel of record Richard deSaulles. With DBAS's concurrence, the substitution was granted on May 9, 2019. Eight months later, on January 23, 2020, DBAS, through counsel Morris, filed a Motion for Judgment by Default and then obtained shortly thereafter a "Clerks Entry of Default Judgment" on February 4, 2020. The Clerk scheduled a hearing date of April 6, 2020, for DBAS's motion for judgment by default.

At the April 6th hearing, we noted Ta'amu's non-appearance as well as the absence of a Return of Service from movant to certify that notice of the default hearing had been given to Ta'amu in accordance with TCRCP 55(b). DBAS's counsel orally represented that Ta'amu was served notice of the hearing, but had failed to provide an affidavit of service. Given Ta'amu's apparent lack of notice, the Court declined to entertain the motion and informed counsel for DBAS that service of process would need to be completed again in compliance with the known

default judgment procedures. See 55 T.C.R.C.P.

Rather than complying with the Court's directive, DBAS's counsel filed a document on July 22, 2020, styled "Renewed Motion for Judgment by Default" (the "latest filing"), whereby DBAS moves the

Clerk of Courts to enter a Judgment of Default against the Defendant...for the following reasons:

1. The defendant was personally served with a summons and complaint, copies of which are attached hereto as Exhibit A, on February 25, 2019.

...

3. At a hearing on 4/7/2020 (sic) for motion for judgment by default this court refused to grant the motion citing the defendant had not been served notice of the 4/7/2020 hearing, despite undersigned counsel's word as an officer of the court that he had been personally served with the relevant documents and notices.

Attached to the latest filing is a belated Affidavit of Service from one Sonny Ale averring, *inter alia*, that:

On Thursday, the 6th of February 2020 at 3:07 pm, I personally served the following documents to IAKOPO TA'AMU, at his residence in Matu'u, American Samoa.

- a. NOTICE OF HEARING ON MOTION FOR DEFAULT JUDGMENT.
- b. CLERKS (sic) ENTRY OF DEFAULT JUDGEMENT.
- c. AFFIDAVIT OF SERVICE.

Also contained in the Clerk's file is an "Affidavit of Service," signed by a Monica Oliver, filed on January 23, 2020, averring that Ms. Oliver personally served the Defendant with an "attached complaint" nearly eleven months beforehand on February 25, 2019. However, no copy of the referenced complaint was included as an attachment to the January 23, 2020 "Affidavit of Service," nor does the Affidavit of Service indicate whether the Court's Summons was at all served upon Ta'amu.

## DISCUSSION

### 1. In Personam Jurisdiction

As discussed above, there is no clear indication on file that Ta'amu was ever served with the Complaint and the Court's Summons. And as also noted, DBAS's latest filing, signed by counsel Morris, forthrightly asserts that "[Ta'amu] was personally served with a summons and complaint, copies of which are attached hereto as Exhibit A, on February 25, 2019." On the basis of this assertion by counsel, we once again scoured the Clerk's file and found that the only DBAS document with the Clerk marked as "Exhibit A" is an attachment to the Complaint containing a lease instrument; we found no return made by DBAS certifying the service of the Complaint and Summons on Ta'amu. There being no Exhibit A to be found, counsel's signature to the latest filing would seem therefore to be a TCRCP 11 violation. Moreover, the attachment to the latest filing which we alluded to above as a belated affidavit of service, under signature of Sonny Ale, refers only to: "Notice of Hearing on Motion for Default Judgement; Clerks Entry of Default Judgment; and Affidavit of Service." There is no reference to the Complaint and Summons. A Rule 11 order to show cause will accordingly issue to counsel Morris.

We conclude on the record before us that the Court lacks *in personam* jurisdiction over the defendant.

### 2. Renewed Motion to Clerk of Courts to enter a Judgment of Default

In this jurisdiction, the Clerk's entry of Judgment by default was abolished by amendment to then TCRCP 55(b)(1)<sup>1</sup> on March 16, 1987. See *Samoa Products Inc., v. A'asa*, 17 A.S.R.2d 66, 67 (Trial Div. 1990). Effectively therefore, the entry of judgment, by default or otherwise, is made "upon a decision of the court." TCRCP Rule 58. The Clerk of Courts has no authority to be entering judgment upon the demands of plaintiff's counsel. A decision of the Court not having been made herein on the merits of DBAS's Complaint, the latest filing's demands to Clerk of Courts are accordingly quite baseless.

Moreover, counsel would do well to heed the Court's directives regarding strict compliance with rules of court, especially those concerning procedural due process requirements of notice because notice goes to the very heart of the Court's power to grant his client a remedy that impacts defendant's property rights. As this Court has noted in *Ferstle v. Am. Samoa Gov't*, 7 A.S.R.2d 26, 49 (Trial Div. 1986), "the essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and an opportunity

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<sup>1</sup> Rule 55(b)(1) stated:

Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of plaintiff and upon affidavit of the amount due shall enter judgment for amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

to meet it," citing *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). In terms of default proceedings, Rule 4(g) TCRCP provides, in relevant part

[t]he person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than the marshal or his deputy, he shall make affidavit thereof.

4(g) T.C.R.C.P. (emphasis added). The language employed by the rule is couched in the imperative; its requirements are, without exception, mandatory.

At the April 6, 2020 hearing, DBAS's counsel offered "his word as an officer of the Court that [Ta'amu] had been personally served all the relevant documents and notices" for the April 6, 2020 hearing. However, the affidavit of service was not filed with the Court until July 22, 2020, over three months after the hearing. Submitting an affidavit of service over three months after the hearing is not "prompt" as Rule 4(g) mandates. Oral representations of service, on the self-serving claim of counsel as "an officer of the court," are not a valid substitute for Rule 4(g)'s unambiguous requirement for a prompt affidavit of service. Quite clearly, accuracy and reliability are due process demands behind TCRCP 4(g)'s requirement for a prompt return of service. Indeed, the very facts here underscore why counsel's mere status as an "officer of the court" hardly cuts it. Among other things, counsel has no personal knowledge of the events averred to in the untimely third-party "affidavits of service." His assertions of

fact as to service of process are hearsay-based and this Court is not averse to minimizing adherence to the Court's Rules of Procedure simply because of inexcusable party oversight. As we expressed at the April 6, 2020 hearing, the process needs to be completed according to the rules of civil procedure.

Further, the motion for default judgment was never taken under advisement as the evidence of proper service was deemed insufficient. The Court is neither inclined to skirt the notice requirements under 55 TCRCF nor to render a decision on the sufficiency of the claims proffered by DBAS without presenting any sort of showing to enable the Court "to scrutinize the evidence itself" and "conclude for itself whether the amount [prayed for] has been correctly calculated." *Scalese v. Gorniak*, 26 A.S.R.2d 85, 86 (Trial Div. 1994).

ORDER

On the foregoing, the following orders will enter:

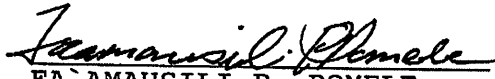
1. DBAS shall within 14 days hereof either take demonstrated steps to serve the Complaint and Summons upon the defendant Ta'amu, in compliance with applicable law and rules of court, or suffer dismissal of the action.

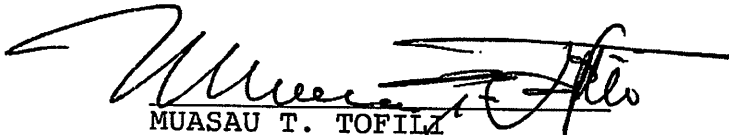
2. Counsel Morris is ordered show cause on September 17, 2020, at the forenoon, before this Court, as to why Rule 11 sanctions should not be imposed.

It is so ordered.

Dated: 8/31/20

  
F. MICHAEL KRUSE  
Chief Justice

  
FA'AMAUSILI P. POMELE  
Associate Judge

  
MUASAU T. TOFIGA  
Associate Judge