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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ESCO MARINE INC.,

Plaintiff,

Civ. S- 11-1353 KJM GGH

vs.

SS PACIFIC STAR,

Defendant.

FINDINGS AND RECOMMENDATIONS

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Previously pending on this court’s law and motion calendar for October 6, 2011 was plaintiff’s motion for default judgment and interlocutory sale of vessel, filed September 16, 2011. No opposition was filed. Norman Ronneberg appeared for plaintiff. Defendants Choi and Falche appeared in pro se. At hearing, all agreed that the motion was for interlocutory sale only, as one cannot have both an *interlocutory* order and a *judgment* on the same matter at the same time. Upon review of the motion and supporting documents, the court now issues the following findings and recommendations.

BACKGROUND

On December 15, 2008, plaintiff filed the underlying complaint in this action in the Northern District of California. The case was transferred to this district because the *in rem* defendant, a vessel named the SS Pacific Star (ex-ARTSHIP), is berthed at Mare Island in

1 Vallejo, which is in the Eastern District of California. Other defendants are International
2 Maritime Security Alliance, LLC (“IMSA”), International Data Security, Inc. (“IDS”), Anna
3 Falche, and Kenneth Choi.¹

4 According to the first amended complaint, filed April 30, 2010, plaintiff Esco
5 Marine sold the SS Pacific Star² to defendant IMSA on June 14, 2007. (FAC ¶ 17.) IMSA
6 assumed the responsibilities of plaintiff’s wharf lease with Lennar whereby IMSA would pay the
7 monthly dock rental of \$12,000 and monthly operational costs of \$862, and procure annual
8 liability and pollution insurance for the vessel. (Id. at ¶¶ 16, 19; Ronneberg Decl., ¶ 10.)³ Lennar
9 was aware of the sale but did not enter into a new lease agreement with IMSA but rather
10 continued to hold Esco Marine liable under the lease. (Id. at ¶ 21.) IMSA failed to pay rent or
11 procure the required insurance, and on April 7, 2008, plaintiff informed IMSA and its principals,
12 Choi and Falche, that they were in default. (Id. at ¶ 24.) IMSA has continued to refuse to make
13 payments or move the ship. The lease was terminated on November 14, 2008. (Id. at ¶ 29.)
14 Plaintiff seeks declaratory judgment and payment of past and future rent and overhead charges as
15 long as the vessel is at Lennar’s wharf, payment of insurance, arrest and sale of the ship to pay
16 \$91,000 in damages, plus interest, costs and fees.

17 This case has a long history of attempts by plaintiff to get defendants to move the
18 vessel and numerous promises by defendants to comply with these requests, to no avail. Years of
19 recalcitrant conduct by defendants culminated in the Northern District’s order of May 17, 2011,
20 wherein the court dismissed defendants’ counter-claim against Esco Marine with prejudice,
21 struck defendants’ answer to the first amended complaint, noted that previous monetary sanctions
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23 ¹ Defendant Naughton passed away in February, 2011. See Dkt. no. 99 at 2.

24 ² The ship’s name was originally ARTSHIP.

25 ³ Although the unverified FAC listed the monthly rent at \$6,000, the declaration of Mr.
26 Ronneberg indicates the monthly dock rental fee is \$12,000, based on a contract entered into by
plaintiff in 2004 and IMSA in 2008. (Id.)

1 had never been paid and ordered them paid by a date certain with interest, imposed further
2 monetary sanctions, granted default “judgment” against all defendants on the allegations of the
3 first amended complaint except for the scope and amount of damages, found that defendants had
4 breached the contracts specified in the first amended complaint, and that defendants Falche and
5 Choi were the alter egos of defendants IMSA and IDS and therefore personally liable for the
6 liabilities of those corporations as well as their own. Order, filed May 17, 2011. (Dkt. no. 109.)⁴
7 The order of default judgment (entry of default, see footnote 4) was electronically served on
8 defense counsel of record.

9 After transfer of the action to this district on May 18, 2011, a warrant of arrest
10 was issued pursuant to this court’s order of July 13, 2011. (Dkt. no. 121.) A notice of arrest was
11 published in the Sacramento Bee and the San Francisco Chronicle on July 21 and 24, 2011.
12 (Dkt. nos. 125, 128.) All defendants were served with the notice of arrest. (Beach Decl., dkt. no.
13 152, ¶¶ 2, 3, 6; dkt. no. 124.) Defendant Choi filed a letter, dated August 8, 2011, which
14 purported to object to the arrest of the vessel, (Dkt. no. 135.); however, this objection was
15 deficient on its face. Just prior to the filing of this letter, defense counsel Scott Furstman, who
16 had represented defendants from the beginning, was terminated as counsel by order of August 2,
17 2011. (Dkt. no. 133.) It was at this time that corporate defendants IMSA and IDS were ordered
18 to retain counsel within thirty days or face entry of default. (Id.) On September 12, 2011, after
19 representing defendants as co-counsel since November 15, 2010, Robert Sheppard was permitted
20 to withdraw as counsel. (Dkt. no. 146.) Shortly thereafter, on September 16, 2011, plaintiff filed
21 the instant motion and supporting papers which were served by mail on defendants at their last
22 known address. Defendants filed no opposition to the motion.

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25 ⁴ The undersigned has construed the “default judgment” as an entry of default because
26 the matter of damages was reserved, one cannot have a judgment, appealable by its terms because
it is final, with the important matter of damages left hanging. As set forth in Fed. R. Civ. P.
54(b), erroneous use of the term “judgment” does not change its inherently interlocutory nature.

1 DISCUSSION

2 Although plaintiff's September 16, 2011 motion is styled "motion for order of
3 default judgment and interlocutory sale of vessel," counsel conceded at hearing that the motion in
4 reality seeks only an order for the sale of the vessel. The unique history of this case warrants this
5 characterization as Judge Illston already entered default judgment against all defendants "save as
6 to the scope and amount of damages." (Dkt. no. 109.) Because the damages were not
7 ascertained at the time of that order, the order itself serves as an entry of default only. See
8 footnote 4 above. The district court's order was based, not on failure to plead or otherwise
9 defend, but rather to sanction defendants for their conduct throughout the case. Plaintiff's
10 motion for sanctions which led to the order of default judgment sets forth defendants' actions in
11 full, and described three previous motions for sanctions which were granted, but which
12 defendants contemptuously disregarded. (Dkt. no. 102.) Defendants flouted court orders to
13 produce discovery and appear for deposition, were sanctioned monetarily for their untruthful
14 representations that no responsive documents existed, and their sanction check was returned for
15 insufficient funds. (Id.) The court found "outright defiance of this court's orders" and that one
16 of the defendants had "committed perjury" at his deposition. (Id. at 13, Ronneberg Decl., Ex. E.)
17 At the hearing on the motion, the district judge proclaimed on the record:

18 [Defendants] are in outright defiance of this court's orders.

19 As far as I can tell, Mr. Choi, who actually is quite a
20 charming man, I think, committed perjury at his deposition,
21 because that's not the kind of thing about which one would be
22 confused or mistaken. That was just a clear lie, it sounds like to
23 me, and it was a material matter.

24 So, you know, those are all very serious things. And I have
25 absolutely no confidence either in the likelihood of his showing up
26 for his deposition, or it's being truthful once it's given, based on
the track record we have seen so far in this case.

24 (Ronneberg Decl., Ex. E.)

25 At hearing on the instant motion, defendant Falche gave various reasons why
26 defendants should be excused, that co-defendant Admiral Naughton, President of IMSA, had

1 died in February and that she had been diagnosed with cancer at that time. She also asserted that
2 former counsel Furstman was de-barred and that defendants were unable to get documents from
3 him. All of these unfortunate events did happen, however, they occurred long after the conduct
4 which the Northern District found sanctionable. Whatever the reason for Furstman's debarment,
5 the fact remains that defendants were represented by competent co-counsel Sheppard until just a
6 few weeks ago.⁵

7 To the extent that any of these arguments existed and could have been raised with
8 the district court at the time of the hearing on the motion for terminating sanctions, they should
9 have been raised at that time. That order now stands as the law of the case. Defendants' only
10 recourse was to move for reconsideration of the order of default judgment (entry of default).
11 They can not now argue the merits of that decision, but are limited to arguing the scope of the
12 damages only. See W.W. Schwarzer, A.W. Tashima & J. Wagstaffe, Federal Civil Procedure
13 Before Trial § 6:6 (entry of default removes defendant's right to appear in the action other than
14 by filing a motion for relief from default); § 6:92 (entry of default judgment establishes
15 defendant's liability and he may only dispute amount of damages). Entry of default effects an
16 admission of all well-pleaded allegations of the complaint by the defaulted party. Geddes v.
17 United Financial Group, 559 F.2d 557 (9th Cir. 1977).

18 "A judgment by default may not be entered without a hearing on damages unless
19 ... the amount claimed is liquidated or capable of ascertainment from definite figures contained in
20 the documentary evidence or in detailed affidavits." Dundee Cement, 722 F.2d 1319, 1323 (7th
21 Cir. 1983) (citing Geddes); Davis v. Fendler, 650 F.2d 1154, 1161 (9th Cir.1981) (no hearing
22 necessary when documents show judgment amount based on a definite figure); see also Fed. R.
23 Civ. P. 55(b)(2) (the district court has the discretion to conduct or refuse a hearing on default

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25 ⁵ It should be noted that Mr. Sheppard withdrew as counsel because he had not been paid
26 his fees for nine months, and none of the defendants would communicate with him over the
previous five months, despite numerous attempts to communicate on his part. (Dkt. no. 137 at
2.)

1 judgment). A hearing on the issue of damages is not required as long as the court finds there is a
2 basis for the damages specified. Transatlantic Marine Claims Agency, Inc. v. Ace Shipping
3 Corp., 109 F.3d 105, 111 (2d Cir. 1997). Affidavits or other documentary evidence is sufficient
4 to evaluate the fairness of the amount requested. Tamarin v. Adam Caterers, Inc., 13 F.3d 51, 54
5 (2nd Cir. 1993).

6 Because defendants filed no opposition to the instant motion, their arguments may
7 not be heard. See E. D. Local Rule 230(c) (“No party will be entitled to be heard in opposition to
8 a motion at oral arguments if opposition to the motion has not been timely filed by that party”).⁶
9 Despite the fact that orders of this court have been returned as undeliverable (dkt. entries on
10 September 21 and 28, 2011), defendants were properly served with the motion at their address of
11 record. See E. D. Local Rule 182(f) (each party has a continuing duty to notify the Clerk and
12 other parties of a change of address, and without such notice, service of documents at a prior
13 address of record shall be fully effective). As plaintiff points out, the address used by the court
14 and the parties for service of documents which were returned as undeliverable is the same
15 address used by defendant Choi on his letterhead to object to the arrest. (Compare docket
16 number 135 and docket entries on September 7, 21, 28, 2011.)

17 Therefore, the previous entry of default judgment and the failure to file opposition
18 to plaintiff’s motion prevent defendants from any consideration in opposition to the motion.
19 Having reviewed plaintiff’s declarations in support of its motion, the court now makes the
20 following findings.

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24 ⁶ Although the defaulting defendants could not contest liability, the interlocutory sale of a
25 vessel goes to the ultimate remedy here, and the defaulting defendants, if they had properly
26 opposed the interlocutory sale for some reason other than already-determined-liability, could
have sought to avert the sale. As explained in the text, they did not oppose the interlocutory sale
on proper grounds.

1 IMSA is the owner of the vessel named ARTSHIP which it re-named the SS
2 Pacific Star. Ownership was registered with the United States Coast Guard on May 20, 2008.⁷
3 The ship is located in Vallejo which is in the Eastern District of California. The request for
4 arrest was reviewed by the undersigned and found to be proper. The arrest of the vessel
5 complied with statutory notice requirements. Supplemental Admiralty Rules C(3), C(4).
6 Publication of notice of the arrest was properly effectuated. (Dkt. nos. 125, 128.) Because the
7 vessel is found in this district and it has been properly arrested, this court has jurisdiction over
8 the vessel SS Pacific Star. Fed. R. Civ. P. Supp. C(2).

9 Defendants had notice of the arrest of the vessel and the instant motion for default
10 judgment. (Dkt. nos. 121, 124, 125, 128, 148.) Upon arrest of the vessel, and pursuant to the
11 court's order of arrest, filed July 13, 2011, defendants had the opportunity to object to the arrest
12 and request a post-arrest hearing within fourteen days of publication of the notice of arrest, but
13 failed to do so. Id., Rule C(6)(a), E(4)(f).

14 Defendant Choi's letter, filed August 8, 2011, failed to contain a verification or
15 sworn affidavit and did not comply with the requirements set forth in Supplemental Admiral
16 Rules C(6) and E(4)(f). See Rule E Advisory Committee Notes to 1985 Amendment (post-arrest
17 challenge should use application similar to application for temporary restraining order as found
18 in Rule 65(b)). Rule C(6) requires that a person claiming an interest in the property that is the
19 subject of the action file a verified statement within fourteen days of the execution of process or
20 other time allowed by the court. This statement must describe the interest asserted.

21 Furthermore, a person claiming an interest is entitled to a prompt hearing where
22 the plaintiff must show why the arrest or attachment should not be vacated. Supp. Admiralty
23 Rule E(4)(f); E.D. Local Admiralty Rule 513. Choi's letter also failed to request a hearing. See

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25 ⁷ According to the FAC, IMSA sold the ship to IDS; however, Coast Guard records
26 reflect IMSA as the owner. (FAC, dkt. no. 55, ¶ 31.) According to the deposition testimony of
defendant Falche, IMSA is still the registered and actual owner of the vessel. (Ronneberg Decl.,
Ex. D.)

1 Salazar v. Atlantic Sun, 881 F.2d 73, 79 (3rd Cir. 1989) (finding no denial of due process where
2 owner did not request post-arrest hearing). Additionally, Choi, as owner of IMSA, has no right
3 to appear pro se to represent IMSA's interests because this corporation was required to retain
4 counsel and failed to do so, despite the district court's order.

5 Nor has any defendant filed an answer to the demand for arrest within twenty-one
6 days after publication, which is an additional requirement. Rule C(6)(a)(iv). No defendant has
7 offered to cover costs incurred by plaintiff and the United States Marshal in exchange for
8 immediately moving the vessel pursuant to a stipulation. Rule E(5)(c). Defendants have also
9 failed to post a bond or letter of undertaking to cover plaintiff's claim in order to secure the
10 release of the vessel, as permitted by Rule E(5)(a) and 28 U.S.C. § 2464. Defendants' failure to
11 object authorizes the court to hold the vessel in default and bar future claims to the vessel's
12 proceeds. U.S. v. Pride of Texas, 964 F.Supp. 986, 988 (E.D. Va. 1994). As plaintiff has
13 complied with all notice requirements, the time to respond has expired, and no defendant has
14 properly attempted to claim the vessel, plaintiff's motion for interlocutory sale should be granted.

15 Even at this late date in the proceedings, defendants have additional options,
16 however. They may seek leave of court to move the vessel at least three days before the
17 scheduled date of sale and reimburse plaintiff for costs of post-arrest upkeep, custody, wharfage
18 and insurance. Fed. R. Civ. P. Supp. Admiralty Rule E(5). Defendants may alternatively post a
19 bond or other security, including the costs of moving the vessel. Id. Finally, defendants may
20 challenge the sale within three days after the sale, but before it is finally approved and confirmed
21 by this court. E. D. Local Admiralty Rule 570(f).

22 The Supplemental Rules of Admiralty provide in part:

23 (a) Interlocutory Sales; Delivery.

24 i) On application of a party, the marshal, or other person having
25 custody of the property, the court may order all or part of the
26 property sold--with the sales proceeds, or as much of them as will
satisfy the judgment, paid into court to await further orders of the
court--if:

1 (A) the attached or arrested property is perishable, or liable to
2 deterioration, decay, or injury by being detained in custody pending
the action;

3 (B) the expense of keeping the property is excessive or
disproportionate; or

4 (C) there is an unreasonable delay in securing release of the
property.

5 (ii) In the circumstances described in Rule E(9)(a)(i), the court, on
6 motion by a defendant or a person filing a statement of interest or
7 right under Rule C(6), may order that the property, rather than
being sold, be delivered to the movant upon giving security under
these rules.

8 (b) Sales; Proceeds. All sales of property shall be made by the
9 marshal or a deputy marshal, or by other person or organization
10 having the warrant, or by any other person assigned by the court
where the marshal or other person or organization having the
11 warrant is a party in interest; and the proceeds of sale shall be
forthwith paid into the registry of the court to be disposed of
according to law.

12 Supplemental Admiralty Rule E(9)(a).

13 Here, the vessel is more than seventy years old and has had no significant work
14 done on her for at least three years. Plaintiff bought the ship with the intention to use it for scrap
15 purposes, but the scrap metal market has been unprofitable recently. Maritime liens total in
16 excess of \$300,000. Furthermore, the Federal Government has demanded potentially costly
17 pollution remediation expenses. The monthly rent to berth this vessel at Lennar Wharf is
18 \$12,000. The cost of the vessel custodian as required by the U.S. Marshal is \$5,600 per month.
19 Defendants have not paid rent since 2009. Unreasonable delay is also present in that defendants'
20 have a lengthy history of delaying movement of the vessel, including breaking promises and
21 breaching court orders, and the City of Vallejo has an immediate necessity to have the vessel
22 moved in order to obtain federal grant in the amount of \$4.2 million, to build a ferry and
23 passenger terminal. The city of Vallejo will lose this funding if the vessel is not moved soon.

24 (Sheaff Decl., ¶ 8.) The Navy cannot begin environmental remediation activities until the vessel
25 is moved. (Id., ¶ 9.) Plaintiff has submitted a proposed order for disposition of the vessel which

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1 is approved, except that the date of the public auction is rescheduled from October 27 to October
2 28, 2011.

3 CONCLUSION

4 Good cause appearing, IT IS RECOMMENDED that plaintiff's motion for default
5 judgment and interlocutory sale of vessel, construed as a motion for interlocutory sale of vessel
6 only, filed September 16, 2011, (dkt. no. 148), be granted. The proposed order filed by plaintiff
7 on October 7, 2011, (dkt. no. 162), and is approved as to form and substance, except that the date
8 of the sale is rescheduled to October 28, 2011.

9 These findings and recommendations are submitted to the United States District
10 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **five**
11 (5) days after being served with these findings and recommendations, any party may file written
12 objections with the court and serve a copy on all parties. Such a document should be captioned
13 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
14 shall be served and filed within **two** (2) days after service of the objections. The parties are
15 advised that failure to file objections within the specified time may waive the right to appeal the
16 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: October 11, 2011

18 /s/ Gregory G. Hollows
19 UNITED STATES MAGISTRATE JUDGE

20 GGH:076/EscoMarine1353.def.wpd
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