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

ALVARO C. HERNANDEZ,

Plaintiff,

CIV. NO. S-09-0413 MCE GGH

vs.

MICHAEL A. MADRIGAL, JR., et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

Plaintiff's motions for entry of default judgment against defendants Michael Madrigal, Jr. and LIS Mortgage Corporation ("LIS Mortgage"), filed September 18, 2009, (dkt. #s 32, 35), were submitted on the record. Upon review of the motions and the supporting documents, and good cause appearing, the court issues the following findings and recommendations.

BACKGROUND

Plaintiff filed the instant complaint in state court, and on February 10, 2009, defendant FDIC (as receiver for Downey Savings) removed the action to this court. The complaint concerns an alleged equity stripping scheme in which defendant Madrigal, plaintiff's son-in-law and employee of LIS Mortgage, was able to refinance the home owned by plaintiff where Madrigal lived with plaintiff's daughter without plaintiff's knowledge or consent.

1 Madrigal and plaintiff's daughter eventually ended their relationship, and Madrigal entered into a
2 relationship with defendant Williams,¹ an employee of defendant Financial Title Company.² The
3 allegations are that Madrigal would act as a loan broker and Williams as an escrow agent and
4 notary as co-conspirators in order to strip the property of its equity by deceit and fraud. Plaintiff
5 further alleges that Countrywide Home Loans, Inc., as loan servicer which held the fraudulently
6 obtained note, conducted a deficient investigation. The complaint also alleges that Downey
7 Savings and Loan Association underwrote and funded the first of the fraudulent loans taken by
8 Madrigal, and was negligent in doing so. Most of the causes of action are against defendants
9 Madrigal, Williams, LIS Mortgage, and Financial Title, and include intentional deceit and
10 concealment, misappropriation of likeness, identity theft, invasion of privacy, conversion,
11 constructive fraud, unlawful lending practices, notary misconduct, and civil conspiracy to
12 defraud. The claim against FDIC as receiver for Downey Savings is for negligence. Claims
13 against Countrywide are declaration of identity theft and defamation of credit.

14 According to affidavit, the complaint and first amended complaint were served on
15 defendant Madrigal on August 18, 2008 and April 4, 2009. Fed. R. Civ. P. 4(e)(2). Haro Aff. ¶
16 2b, d. (Dkt. # 18-2.) Defendant LIS Mortgage was served with the complaint on August 18,
17 2008 and with the first amended complaint on April 3, 2009. Haro Aff. ¶ 2b, d. (Dkt. # 19.)
18 Pacific Atlantic Trading Co. v. M/V Main Express, 758 F.2d 1325, 1331 (9th Cir. 1985) (default
19 judgment void without personal jurisdiction). Defendants Madrigal and LIS Mortgage have
20 failed to file an answer or otherwise appear in this action.³ On May 28, 2009, the clerk entered
21 default against defendant LIS Mortgage. On May 29, 2009, the clerk entered default against
22 defendant Madrigal.

23
24 ¹ Defendant Williams has been dismissed from the action. (Dkt. # 30.)

25 ² Financial Title Company apparently has filed for bankruptcy protection. (Dkt. #22 at
26 3:14.)

³ Defendants Countrywide and FDIC have filed answers. (Dkt. #s 10, 38.)

1 The instant motions for default judgment and supporting papers were served by
2 mail on defendants Madrigal and LIS Mortgage at their last known address. Defendants LIS
3 Mortgage and Madrigal filed no opposition to the motions for entry of default judgment.
4 Plaintiff seeks entries of default judgment in the amount of \$166,763.93 against each of these
5 defendants for lost equity, broker fees and emotional distress.

6 DISCUSSION

7 Entry of default effects an admission of all well-pleaded allegations of the
8 complaint by the defaulted party. Geddes v. United Financial Group, 559 F.2d 557 (9th Cir.
9 1977). The court finds the well pleaded allegations of the complaint state a claim for which
10 relief can be granted. Anderson v. Air West, 542 F.2d 1090, 1093 (9th Cir. 1976).

11 The court is cognizant of the fact that normally a final decree on the merits of an
12 action may not be made against one of several defendants against whom a joint charge is
13 pending. Frow v. De La Vega, 82 U.S. (15 Wall.) 552, 21 L.Ed. 60 (1872) (involving a single
14 alleged joint fraud and resulting in inconsistent adjudications as to liability)⁴; see also Pfanstiel
15 Architects v. Choutreau Pet., 978 F.2d 430, 433 (8th Cir. 1992); In re Uranium Antitrust
16 Litigation, 617 F.2d 1248, 1256-58 (7th Cir. 1980) (holding that Frow does not apply to
17 defendants alleged to be jointly and severally liable, although the damages hearing should be
18 postponed until trial because claims were based on a single injury (a single price-fixing scheme);
19 accord, Dundee Cement Co. v. Howard Pipe and Concrete Products Inc., 722 F.2d 1319, 1324
20 (7th Cir. 1983)); Gulf Coast Fans v. Midwest Elec. Importers, 740 F.2d 1499, 1512 (11th Cir.
21 1984) (default judgment should not be entered against “similarly situated” defendants whose
22 alleged liability, along with that of the remaining defendants, rests on a single contract);
23 International Controls Corp. v. Vesco, 535 F.2d 742, 746-47 & n. 4 (2d Cir.1976) (Frow controls

24
25 ⁴ Frow alleged a conspiracy by several defendants to defraud one plaintiff of title to real
26 property. Default judgment was entered against one defendant, although the others prevailed on
the merits. The Court found this result “unseemly and absurd, as well as unauthorized by law.”
82 U.S. at 554.

1 “in situations where the liability of one defendant necessarily depends upon the liability of the
2 other.”).

3 In re Uranium Antitrust Litigation acknowledged that Frow does not preclude
4 entry of default judgment against some defendants where other defendants remain in the
5 litigation, even where liability is joint and several.⁵ 617 F.2d at 1258. Nevertheless, there is still
6 the possibility of inconsistent determinations as to damages, as well as the lack of judicial
7 economy, in that “there could be two distinct damages awards on a single claim involving joint
8 and several liability.” Id. at 1262. If plaintiff later prevails against the answering defendant, the
9 damage award could be different; however, the joint nature of the claim precludes different
10 findings as to damages against all defendants. Id. Furthermore, where defendants are jointly
11 liable for the entire award, plaintiff could look to any one defendant for full satisfaction of the
12 damage award. Id.

13 In this case, although the causes of action against defendants Madrigal and LIS
14 Mortgage are distinct from those brought against defendants Downey Savings (FDIC) and
15 Countrywide, some of the damages requests overlap. For example, plaintiff seeks \$50,000 in
16 emotional damages against each of the following defendants: Madrigal, LIS Mortgage, Financial
17 Title, and Downey. FAC at 29-30. A trial against the answering defendants might result in an
18 inconsistent verdict on these damages and/or a judgment of a different amount.

19 Furthermore, the declarations as submitted are not adequate to support an award
20 of \$50,000 in emotional distress damages against each defendant. (Dkt. #32-4, 35-4.)

21 The court has discretion to decide whether to enter a judgment by default. 10A
22 Wright, Miller & Kane, Federal Practice & Procedure, § 2685 (1998). In the instant case, no
23 reason appears to justify the entry of default judgment against two of multiple defendants with
24 the possibility of inconsistent liability adjudications.

25 ⁵ The Carmack Amendment permits imposition of joint and several liability. Jessica
26 Howard Ltd. v. Norfolk Southern Railway Co., 316 F.3d 165, 169 (2nd Cir. 2003).

1 In view of the foregoing findings, it is the recommendation of this court that
2 plaintiff's application for entry of default judgment be DENIED.

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

11 DATED: 01/28/10

/s/ Gregory G. Hollows

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GREGORY G. HOLLOWES
UNITED STATES MAGISTRATE JUDGE

14 GGH:076
15 hernandez0413.def.wpd
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