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UNITED STATES DISTRICT COURT
Northern District of California

SCOTT R. SANDERS

Plaintiff,

No. C 05-4990 MHP (MEJ)

v.

FIDELITY MORTGAGE COMPANY *et al.*,

**REPORT & RECOMMENDATION RE
DAMAGES**

Defendants.

I. BACKGROUND

On May 5, 2009, the Honorable Marilyn Hall Patel, the presiding judge in this action, issued a Memorandum & Order regarding Plaintiff's Motion for Default Judgment. (Dkt. #120.) In her Order, Judge Patel granted default judgment in favor of Plaintiff and against Defendant Joel Atwater. However, Judge Patel found that Plaintiff had not submitted sufficient documentation and testimony regarding his claimed damages to enable the Court to determine the dollar amount it should award to Plaintiff. (*Id.* at 6.) Accordingly, Judge Patel referred the matter to the undersigned to hold an evidentiary hearing on the issue of damages and to make findings of fact and recommendations regarding the specific amounts that should be awarded. Judge Patel also instructed Plaintiff that at the hearing, he will need to provide evidentiary support, such as documents, affidavits, or witness or expert testimony to corroborate his claimed damages. (*Id.*) Further, with respect to each area of damages Plaintiff requested, Judge Patel outlined what evidence he would need to submit and what questions he would need to address to enable the undersigned to make a recommendation regarding the proper amount of damages recoverable.

Following Judge Patel's Order, on July 31, 2009, Plaintiff filed a second Motion for Default Judgment (Dkt. #124), and submitted a revised Declaration (Dkt. #123) with supporting documents. However, Plaintiff's materials did not present any discussion addressing the questions Judge Patel

1 posed in her Order or any explanation regarding how the documents attached to the revised
2 Declaration support Plaintiff's request for damages. As a result, the undersigned issued an Order
3 continuing the evidentiary hearing to allow Plaintiff an opportunity to marshal and present whatever
4 evidence he has substantiating his damages and to address Judge Patel's questions. (Dkt. #125.) In
5 response, Plaintiff filed a Supplemental Brief (Dkt. #126) and a Supplemental Declaration (Dkt.
6 #127). On September 24, 2009, the undersigned held an evidentiary hearing regarding Plaintiff's
7 damages. Having considered Plaintiff's written submissions, supporting materials, and the evidence
8 presented at the hearing, the undersigned now **RECOMMENDS** as follows.

9 **II. DISCUSSION**

10 **A. Compensatory Damages**

11 In his Motion for Default Judgment, Plaintiff sought to recover compensatory damages for
12 his out-of-pocket losses, damage to his credit rating, and for emotional distress. (Dkt. #112 at 2;
13 Dkt. #120 at 7.) The undersigned will evaluate each category in turn.

14 1. Out-of-Pocket Damages

15 With respect to Plaintiff's out-of-pocket damages, Judge Patel found that Plaintiff was
16 entitled to recover the following out-of-pocket damages: the down payment on the house; mortgage
17 payments; moving costs (both into and out of the house); improvements to the house; maintenance
18 costs; property taxes; and property insurance premium payments. (Dkt. #120 at 7.) She therefore
19 instructed Plaintiff to provide to the undersigned evidence documenting these losses. (*Id.* at 8.)

20 Plaintiff indicates that he is seeking \$52,070.69 in out-of-pocket damages from Defendant
21 Atwater, calculated as follows. (Suppl. Decl. at 1; Dkt. #113 ¶23; Dkt. #123 ¶25.)

22 First, Plaintiff seeks to recover the \$1,000 down payment he made on the house. (Dkt. #123
23 ¶25; Suppl. Decl. ¶5.) To substantiate this expenditure, Plaintiff has submitted a copy of check
24 drawn on his wife's checking account and made out to First California Title for \$1,000. (Suppl.
25 Decl. Ex. A.) Because the check does not indicate that Plaintiff is a joint account holder and
26 Plaintiff has not provided any information indicating that \$1,000 was community funds, the
27 undersigned finds that Plaintiff has not provided sufficient evidence to substantiate his claim that he
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1 lost \$1,000 on the down payment.

2 Second, Plaintiff seeks to recover moving expenses incurred in connection with both the
3 move into the house and the move out of the house. Plaintiff asserts that he incurred \$750 in
4 expenses when moving into the house (Suppl. Decl. ¶5(c)), and \$250 when moving out of the house
5 (Suppl. Decl. ¶5(I)). Plaintiff, however, indicates that he does not have any receipts substantiating
6 these amounts. Plaintiff has described the types of expenses he claims he incurred during the move,
7 including packaging materials, time off of work, and gas and meals for those who assisted him.
8 Based on Plaintiff's statements, the undersigned finds that Plaintiff's requested amount of \$1,000 for
9 move-in and move-out expenses is reasonable and should be awarded.

10 Third, Plaintiff seeks to recover for payments he made on the first and second mortgages. As
11 to the first mortgage, Plaintiff states that he made payments to Washington Mutual from January
12 2005 through May 2007 totaling \$56,572.61. (Dkt. #123 ¶20 & Ex.2.) Plaintiff has submitted
13 statements from Washington Mutual, which sufficiently substantiate that he paid \$56,572.61 on the
14 first mortgage.

15 With respect to his second mortgage, Plaintiff claims that he made payments totaling
16 \$20,185.05. (Suppl. Decl. ¶¶5(B)(d), 5(B)(e).) More specifically, Plaintiff claims that from January
17 through August 2005, he paid \$5,581.12 to Washington Mutual. The undersigned has reviewed the
18 Washington Mutual Account Activity Statement from 2005 that Plaintiff submitted (Dkt. #123 ¶20
19 & Ex. 3.), and finds that Plaintiff has adequately established that he paid \$5,581.12 to Washington
20 Mutual. Additionally, Plaintiff claims that from September 2005 through July 2006, he paid
21 \$9,792.62 on the second mortgage to EMC. (Dkt. #123 ¶20.) However, the statement from EMC
22 that Plaintiff has submitted indicates that he only paid \$7,560.63. (See Dkt. #123, Ex. 3 at 2-3.)
23 Plaintiff also claims that from August 2006 through May 2007, he paid \$7,043.30 to GMAC. (Dkt.
24 #123 ¶20.) However, the statement from GMAC Plaintiff submitted indicates that he made
25 payments totaling \$6,958.30.¹ Based on the these figures, the undersigned finds that Plaintiff has

26
27 ¹The statement from GMAC indicates that Plaintiff was assessed an \$85.00 fee, which he
28 paid. However, it appears that Plaintiff has added that fee twice when calculating the total amount

1 adequately demonstrated that he paid \$20,100.05 on his second mortgage.

2 Taken together, Plaintiff made \$76,672.66 in mortgage payments on his first and second
3 mortgages for which he is entitled to recover.

4 Fourth, Plaintiff seeks to recover for the homeowners' association dues he paid. In his
5 Declarations, Plaintiff proffers conflicting amounts as to the total fees he paid. In his July 28, 2009
6 Declaration, he indicates that he paid \$1,065 from January 2005 through June 2008, (Dkt. #123
7 ¶13.) In his Supplemental Declaration, Plaintiff indicates that he paid \$1,225 in HOA dues from
8 December 2004 through December 2008. (Dkt. #127, Suppl. Decl. ¶5(e).) In support of his claim,
9 Plaintiff has submitted some checks reflecting payments made, a billing statement from the HOA
10 from December 2008, and an email from the HOA indicating that he had no outstanding fees as of
11 March 2009. The undersigned has reviewed these documents, and based on the figures Plaintiff
12 provided, finds that Plaintiff paid \$1225 in HOA fees, which he is entitled to recover.

13 Fifth, Plaintiff requests that he be awarded the money he spent on improvements and
14 maintenance on the house. Although Plaintiff's Declarations indicate that he is seeking \$8,000 for
15 such expenditures, at the evidentiary hearing, Plaintiff's counsel clarified that Plaintiff is only
16 seeking to recover \$1,000 for these expenses. Plaintiff also indicated that he does not have any
17 receipts documenting the expenses. (Suppl. Decl ¶5(d).) According to Plaintiff, he expended this
18 money on ceiling fans, paint, wallpaper, a garbage disposal, a stove top, wall fixtures, automatic
19 sprinklers, and landscaping. (Suppl. Decl. ¶5(D).) The undersigned has considered Plaintiff's
20 statements regarding the money he expended on improvements and maintenance and based on such
21 representations, finds that Plaintiff spent at least \$1,000, for which he is entitled to recover.

22 Sixth, Plaintiff requests that the Court award him \$2,453.55 for property taxes he paid on the
23 house. (Suppl. Decl ¶5(F).) Plaintiff has submitted property tax bills, which the undersigned has
24 reviewed and finds that they substantiate the requested amount of \$2,453.55. (Dkt. #123 ¶20 & Ex.
25 5.)

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27 of payments he made to GMAC. The undersigned's determination that Plaintiff paid \$6,958.30
28 reflects one-time payment of the \$85.00 fee.

1 Finally, Plaintiff seeks to recover \$2,274.48 that he claims he expended on property
2 insurance premiums on the house. (Suppl. Decl. ¶5(G).) Plaintiff has submitted statements
3 reflecting the amounts paid. (Dkt. #123 ¶20 & Ex. 4.) The undersigned has reviewed the statements
4 and considered the premium amounts for the months for which Plaintiff does not have statements,
5 and finds that Plaintiff has sufficiently established that he paid \$2,274.28 in property insurance, for
6 which he is entitled to recover.

7 Taken the foregoing figures together, Plaintiff shown that he is entitled to \$84,625.49 in out-
8 of-pocket damages. However, Plaintiff also acknowledges that this amount must be reduced by the
9 amount of corresponding expenses he would have incurred had he not purchased the house through
10 Defendant Atwater. In his Declaration, Plaintiff indicates that had Defendant Atwater not defrauded
11 him, he would have continued to rent an apartment at a rate of \$800 a month. (Dkt. #123 ¶25.)
12 Because Plaintiff would have incurred at least \$33,600 in rent during the time he lived in the house
13 he purchased, this amount should be offset against the total amount of his out-of-pocket damages,
14 reducing the total to \$51,025.49. Accordingly, the undersigned **RECOMMENDS** that the Court
15 award Plaintiff \$51,025.49 in out-of-pocket damages.

16 2. Damage to Credit Rating

17 In his Supplemental Declaration, Plaintiff indicates that he is no longer seeking to recover for
18 damage to his credit rating. (Suppl. Decl. ¶¶4, 6.) Accordingly, this issue is moot.

19 3. Emotional Distress

20 In his Supplemental Declaration, Plaintiff indicates that he is seeking \$55,000 in damages for
21 his emotional distress. (Suppl. Decl. ¶4.) In support of this amount Plaintiff indicates that, as a
22 result of his dealings with Defendant Atwater relating to the purchase of the house, his relationship
23 with his wife became severely strained. (Dkt. #123 ¶24.) Plaintiff also states that, as a result the
24 stress he experienced in connection with the house, he had to see a therapist, who prescribed an anti-
25 depressant. (*Id.*) When his condition worsened, he again saw the therapist and was prescribed a
26 second anti-depressant, as well as a prescription for sleeping pills. (*Id.*) He indicates that he
27 incurred co-payments of over \$120 for the office visits and prescriptions.

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1 Aside from the foregoing statements, Plaintiff has not submitted any other documentary
2 evidence regarding the amounts he paid out in pursuing medical care or any medical evidence of his
3 symptoms. As a result, the undersigned must base the appropriate amount of emotional distress
4 damages strictly on Plaintiff's statements in his Declarations and his counsel's description at the
5 evidentiary hearing. Like Judge Patel, the undersigned finds that Plaintiff's representations
6 regarding the emotional distress he suffered to be credible, particularly in light of the circumstances
7 of this case. However, Plaintiff has not presented any explanation as to how he arrived at the
8 \$55,000 figure he requests. Considering Plaintiff's description of the distress he suffered as a result
9 of his dealings with Defendant Atwater, the undersigned finds that an award of \$25,000 is
10 reasonable. The undersigned therefore **RECOMMENDS** that the Court award \$25,000 to
11 compensate Plaintiff for his emotional distress.

12 4. Compensatory Damages Already Awarded Against Other Defendants

13 Finally, Judge Patel noted in her Order that Plaintiff's compensatory damages award against
14 Defendant Atwater must be offset against any compensatory damages that have already been
15 awarded to Plaintiff against any other defendants in this case. (Dkt. #120 at 8-9.) In his
16 Declaration, Plaintiff indicates that he obtained a judgement of non-dischargeability in bankruptcy
17 court for \$52,325.69 against Defendant Coker dba Fidelity Mortgage Company and Pacific Home
18 Brokers. (Dkt. #123 ¶28 & Ex.6.) However, Plaintiff states that he has not received any money
19 from that judgment. (*Id.*) Because Plaintiff has not recovered any of his compensatory damages
20 from Defendant Coker, there is no basis to reduce the amount of his compensatory damages.
21 However, should Plaintiff receive any payment from Defendant Coker in satisfaction of his
22 judgment against him, Plaintiff's compensatory damage award against Defendant Atwater should be
23 reduced accordingly.

24 5. Compensatory Damages Recommendation

25 In sum, with respect to compensatory damages, the undersigned **RECOMMENDS** that the
26 Court award Plaintiff \$51,025.49 in out of pocket damages and \$25,000 for emotional distress, for a
27 total of \$76,025.49 in compensatory damages.

1 **B. Punitive Damages**

2 In her Order, Judge Patel found that Plaintiff had established by clear and convincing
3 evidence that he is entitled to punitive damages. (Dkt. #120 at 9.) She therefore instructed the
4 undersigned to consider and make recommendations on the appropriate amount of punitive damages
5 to award. Plaintiff requests an award of \$25,000 in punitive damages. (Suppl. Decl. ¶4.) The
6 question, then, is whether this amount is reasonable.

7 Under California law, when assessing punitive damages, courts are to consider: (1) the
8 degree of reprehensibility of the defendant's conduct; (2) the amount of compensatory damages
9 awarded to the plaintiff; and (3) the wealth of the defendant. *Neal v. Farmers Ins. Exchange*, 21
10 Cal. 3d 910, 928 (1978); *see also Harrell v. Kepreos*, No. CIV S-06-0849, 2008 WL 619117, at *4
11 (E.D. Cal. Mar. 4, 2008).

12 With respect to the first factor, as Judge Patel highlighted in her Order, Defendant Atwater
13 made a series of misrepresentations to Plaintiff, including that he could secure a loan for Plaintiff
14 that he could afford and which did not have a pre-payment penalty. After the loan payments
15 exceeded what he had represented to Plaintiff, Defendant Atwater assured Plaintiff that he could
16 refinance his loans into one consolidated loan that would reduce the monthly payments by half, at no
17 cost to Plaintiff. Defendant Atwater, however, never delivered on this representation. Defendant
18 Atwater also falsified information on Plaintiff's loans applications without Plaintiff's knowledge and
19 misrepresented other material terms of the loans to Plaintiff. As a result of Defendant Atwater's
20 conduct, Plaintiff was unable to afford the monthly payments on the two loans and ultimately
21 defaulted on the loans. Throughout this period, Plaintiff experienced emotional distress and his
22 relationship with his wife became strained. These facts demonstrate the reprehensibility of
23 Defendant Atwater's conduct and support the need for punitive damages to deter him from similar
24 conduct in the future.

25 As to the second factor, as indicated above, the undersigned recommends that the Court
26 award \$76,025.49 in compensatory damages. Plaintiff's requested amount of punitive damages is
27 thus less than the amount of his compensatory damages and is not excessive in relation to his actual
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1 damages.

2 Looking at the final factor, which focuses on the defendant’s financial condition, Plaintiff
3 has not submitted any evidence regarding Defendant Atwater’s financial status. The California
4 Supreme Court has indicated that evidence of a defendant’s financial condition is a prerequisite to an
5 award of punitive damages in order to ensure that the award will actually serve to deter the
6 defendant’s conduct. *Adams v. Murakami*, 54 Cal. 3d 105, 119 (1991). Without such information,
7 the undersigned cannot determine whether the amount of punitive damages Plaintiff seeks exceeds
8 the amount necessary to properly punish and deter Defendant Atwater from future misconduct. *See*
9 *id.* at 110. Consequently, because Plaintiff has not met his burden of producing evidence on this
10 factor, the undersigned **RECOMMENDS** that the Court **DENY WITHOUT PREJUDICE**
11 Plaintiff’s request for an award of \$25,000 in punitive damages and **GRANT** Plaintiff leave to
12 marshal evidence relating to Defendant Atwater’s financial condition and move for reconsideration
13 of the proper amount of punitive damages that should be awarded.

14 **C. Disgorgement Pursuant to California Unfair Business Practices Law**

15 In her Order, Judge Patel found that Plaintiff had established Defendant Atwater’s actions
16 violated California business law, and therefore California’s unfair competition law, such that
17 Plaintiff could disgorge Defendant Atwater of any money Plaintiff paid him in connection with his
18 unlawful business practices. (Dkt. #120 at 10.) Toward this end, Judge Patel directed Plaintiff to
19 prepare and provide evidence as to what money he paid Defendant Atwater in connection with his
20 provision of real estate services. (*Id.*) To guide Plaintiff, the Court explained that the settlement
21 statement that Plaintiff submitted was insufficient to establish the amount he paid to Defendant
22 Atwater. (*Id.*) Specifically, the Court noted that although Plaintiff alleged that the statement
23 demonstrates that he paid \$9,875 to Pacific, line 702 of the settlement statement indicates that the
24 commission was paid from the seller’s funds, not Plaintiff’s funds. (*Id.*) Additionally, the Court
25 noted that although Plaintiff alleges that he paid \$6,800 to Fidelity, the documents Plaintiff
26 submitted only reflect that Plaintiff paid Fidelity a loan origination fee, a processing fee, and a
27 broker underwriting fee, totaling \$4,100. (*Id.* at 10-11) Finally, Judge Patel noted that even if
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1 Plaintiff could establish the total amount he paid to Pacific and Fidelity, Plaintiff must provide
2 evidence corroborating his allegations that Defendant Atwater was paid all but \$500 of this amount.
3 (*Id.* at 11)

4 Reviewing the documents Plaintiff filed after Judge Patel issued her Order, Plaintiff has re-
5 submitted the same evidence Judge Patel previously reviewed. Specifically, in his July 28
6 Declaration, Plaintiff alleges that according to the settlement statement attached to his Declaration,
7 Pacific received a broker's commission in the amount of \$9,875 and Fidelity received \$6,800 in
8 connection with the making of his loans, for a total of \$16,675. (Dkt. #123 ¶¶12,27; Suppl. Decl.
9 #7) Plaintiff has not offered any explanation addressing the questions Judge Patel previously posed
10 regarding these amounts. Thus, as an initial matter, Plaintiff has not substantiated his allegations
11 that he paid \$16,675 to Pacific and Fidelity.

12 Moreover, as indicated above, in order to seek disgorgement of fees paid to Defendant
13 Atwater, Plaintiff has the burden of establishing that *Defendant Atwater* actually was paid those
14 fees. As he did in his Motion for Default Judgment, Plaintiff alleges Defendant Coker stated that
15 Defendant Atwater received all but \$500 of the \$16,675 in fees and commissions that he paid.
16 Plaintiff, however, has not provided any other information about the statement from Defendant
17 Coker, such as when he made the statement, to whom he made it, or the context or setting in which
18 he made the statement. Without such information, the undersigned cannot assess the reliability of
19 the proffered statement. Aside from this statement, Plaintiff has not provided any other evidence to
20 corroborate his allegation that Defendant Atwater was paid all \$500 of the fees he paid to Defendant
21 Coker and/or Fidelity or Pacific. As a result, the undersigned finds that Plaintiff has failed to
22 sufficiently establish the amount of money he paid Defendant Atwater in connection with his
23 unlawful business practices. The undersigned therefore **RECOMMENDS** that the Court **DENY**
24 Plaintiff's request for disgorgement of \$16,175 from Defendant Atwater.

25 **D. Costs**

26 In her Order, Judge Patel found that Plaintiff, as the prevailing party in this action, is entitled
27 to recover costs. (Dkt. #120.) In March 2009, Plaintiff's counsel filed a declaration stating that, at
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1 that time, Plaintiff had incurred \$1,313.98 in costs. (Dkt. #114.) Having reviewed counsel's
2 declaration, the Court finds that Plaintiff has sufficiently established that he is entitled to \$1,313.98
3 in costs. However, Plaintiff has not filed any amended declaration updating this figure since March
4 2009, and the Court is unable to determine whether any expenses were incurred after that date. The
5 undersigned therefore **RECOMMENDS** that the Court grant Plaintiff \$1,313.98 in costs.

6 **III. CONCLUSION**

7 Based on the undersigned's consideration of Plaintiff's Declarations and supporting
8 documents and evidence presented at the hearing, the undersigned **RECOMMENDS** as follows:

9 Plaintiff should be awarded \$76,025.49 in compensatory damages and \$1,313.98 in costs.
10 Plaintiff's request for an award of \$25,000 in punitive damages should be **DENIED WITHOUT**
11 **PREJUDICE**. Plaintiff's requests for disgorgement of fees paid to Defendant Atwater should be
12 **DENIED**.

13 Pursuant to Fed. R. Civ. P. 72(b)(2) a party may serve and file objections to this Report and
14 Recommendation fourteen (14) days after being served.

15 **IT IS SO ORDERED.**

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17 Dated: January 7, 2010

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20 Maria-Elena James
21 Chief United States Magistrate Judge
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