

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LEHMAN BROTHERS HOLDING, INC.

Plaintiff,

v.

IZT MORTGAGE, INC. *dba* Ameritech
Mortgage,

Defendant.

No. C-09-4060 EMC

**ORDER GRANTING PLAINTIFF'S
MOTION FOR DEFAULT JUDGMENT**

(Docket No. 60)

Plaintiff Lehman Brothers Holdings, Inc. ("LBHI") has filed suit against Defendant IZT Mortgage, Inc. for, *inter alia*, breach of contract. Both parties consented to proceeding before a magistrate judge. *See* Docket Nos. 4, 20 (consents). Currently pending before the Court is LBHI's motion for default judgment. Having considered the papers submitted, the Court hereby **GRANTS** LBHI's motion.

I. FACTUAL & PROCEDURAL BACKGROUND

In its complaint, LBHI alleges as follows. LBHI and a related entity Lehman Brothers Bank, FSB ("LBB") are engaged in the purchase and sale of mortgage loans. *See* Compl. ¶ 6. On February 16, 2006, LBB entered into a written Loan Purchase Agreement with IZT. *See* Compl. ¶ 8. That agreement incorporated the terms and conditions of a certain Seller's Guide. *See id.*; *see also* Docket No. 62 (Pl.'s Supp. Filing, Ex. A) (Loan Purchase Agreement § 2) (providing that "[t]he terms and conditions of the Seller's Guide . . . are hereby incorporated and made a part hereof and are an integral part of this Agreement"; also providing that IZT "agrees to be bound by the terms and

1 conditions” of the Seller’s Guide). IZT sold a number of mortgage loans to LBB under the Loan
2 Purchase Agreement, including loan ****2129. *See* Compl. ¶¶ 10, 17. Subsequently, LBB sold
3 loan ****2129 to LBHI. *See id.* ¶ 11. In addition, LBB assigned all of its rights and remedies under
4 the Loan Purchase Agreement to LBHI. *See id.* ¶ 12; *see also* Baker Decl., Ex. A (Seller’s Guide §§
5 701, 713.3) (discussing LBB’s right to assign).

6 According to LBHI, IZT breached the Loan Purchase Agreement with respect to the sale of
7 loan ****2129. More specifically, IZT breached the terms and conditions of the Seller’s Guide,
8 which, as noted above, was incorporated by reference into the agreement. For example, under
9 Section 703 of the Seller’s Guide, IZT made the following representations and warranties to LBB:

10 1. . . . No document, report or material furnished to [LBB/LBHI]
11 in any Mortgage Loan File or related to any Mortgage Loan
12 (including, without limitation, the Mortgagor’s application for the
Mortgage Loan executed by the Mortgagor), was falsified or contains
any untrue statement of fact

13

14 12. . . . The documents, instruments and agreements submitted for
15 loan underwriting were not falsified and contain no untrue statement
of material fact No fraud was committed in connection with the
16 origination of the Mortgage Loan. [IZT] has reviewed all of the
documents constituting the Mortgage Loan File and has made such
17 inquiries as it deems necessary to make and confirm the accuracy of
the representations set forth herein.

18

19 27. . . . [IZT] represents that there is no circumstance or condition
20 with respect to the Mortgage, the Mortgaged Property, the Mortgagor,
or the Mortgagor’s credit standing, that can reasonably be expected to
21 cause private institutional investors to regard the Mortgage Loan as an
unacceptable investment, cause the Mortgage Loan to become
22 delinquent, or adversely affect the value or marketability of the
Mortgage Loan.

23 Compl. ¶ 17; *see also* Baker Decl., Ex. A (Seller’s Guide § 703(1), (12), (27)). LBHI alleges that
24 IZT breached the above provisions in Section 703 because the loan application for loan ****2129
25 stated that the borrower’s monthly income was \$8,655.00 when it was actually \$2,068.33. *See*
26 Compl. ¶ 17; *see also* Baker Decl., Ex. A (Seller’s Guide § 704(1) (providing for an IZT default if
27 IZT breaches any of the representations, warranties, or covenants set forth in the Seller’s Guide or
28 the Loan Purchase Agreement).

1 as several stipulations.¹ However, after IZT’s counsel withdrew from the case, IZT was obligated to
2 obtain counsel to represent it, which it did not do. Indeed, IZT never obtained counsel even after the
3 Court issued the order to show cause discussed above. Accordingly, the Court finds that IZT has
4 failed to defend the lawsuit thereby giving LBHI the right to seek a default judgment. *See Parker*
5 *West Int’l, LLC v. Clean Up Am., Inc.*, No. C-08-2810 EMC, 2009 U.S. Dist. LEXIS 86346, at *5-6
6 (N.D. Cal. Sept. 1, 2009) (deeming corporation’s failure to obtain counsel to represent a failure to
7 defend under Rule 55).

8 A. Eitel Analysis

9 Under Ninth Circuit law, a corporation’s failure to retain counsel can support an entry of a
10 default judgment. *See Employee Painters’ Trust v. Ethan Enters.*, 480 F.3d 993, 998 (9th Cir. 2007)
11 (noting that “we have recognized default as a permissible sanction for failure to comply with local
12 rules requiring representation by counsel”); *United States v. High Country Broadcasting Co.*, 3 F.3d
13 1244, 1245 (9th Cir. 1993) (stating that it “was perfectly appropriate” for the district court to enter a
14 default judgment against a company when it failed to retain counsel). Ultimately, “[t]he district
15 court’s decision whether to enter a default judgment is a discretionary one.” *Aldabe v. Aldabe*, 616
16 F.2d 1089, 1092 (9th Cir. 1980). Factors that a court may consider in exercising that discretion
17 include:

- 18 (1) the possibility of prejudice to the plaintiff, (2) the merits of
19 plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4)
20 the sum of money at stake in the action; (5) the possibility of a dispute
21 concerning material facts; (6) whether the default was due to
excusable neglect, and (7) the strong policy underlying the Federal
Rules of Civil Procedure favoring decisions on the merits.

22 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Upon entry of default, the factual
23 allegations of the plaintiff’s complaint will, as a general matter, be taken as true, except for those
24 relating to the amount of damages. *See TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917
25 (9th Cir. 1987). A court, however, retains the authority to require a plaintiff to “establish the truth of
26 any allegation by evidence.” Fed. R. Civ. P. 55(b)(2)(C) (also giving a court the authority to
27 “investigate any other matter” in order to enter or effectuate judgment).

28 ¹ It its answer, IZT did not make any assertion that the complaint was not properly served.

1 In the instant case, the majority of factors listed above weigh in favor of a default judgment.
2 For example, if the motion for default judgment were to be denied, then LBHI would likely be
3 without a remedy. IZT has been given multiple opportunities to participate in this litigation but has
4 failed to do so. *See Walters v. Shaw/Guehnemann Corp.*, No. C 03-04058 WHA, 2004 U.S. Dist.
5 LEXIS 11992, at *7 (N.D. Cal. Apr. 15, 2004) (“To deny plaintiff’s motion [for default judgment]
6 would leave them without a remedy. Prejudice is also likely in light of the merits of their claims.”);
7 *Pepsico, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002) (“If Plaintiffs’ motion
8 for default judgment is not granted, Plaintiffs will likely be without other recourse for recovery.”).
9 Also, even though IZT filed an answer to LBHI’s complaint, in which it, *inter alia*, asserted various
10 affirmative defenses, the possibility of a dispute concerning material facts is, in all likelihood, small
11 given IZT’s failure to defend. Finally, there is no indication that IZT’s default was due to excusable
12 neglect.

13 The only remaining *Eitel* factors that deserve closer analysis are the second and third factors
14 – *i.e.*, the merits of LBHI’s substantive claims and the sufficiency of the complaint. These factors
15 basically “require that a plaintiff state a claim on which the [plaintiff] may recover.” *Philip Morris,*
16 *USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003). In the instant case,
17 LBHI has asserted two causes of action: (1) breach of contract and (2) breach of an express
18 warranty. The Court looks to the law of New York in determining what constitutes a breach of
19 contract and an express warranty because both the Loan Purchase Agreement and the Seller’s Guide
20 provide that the Agreement shall be construed in accordance with New York state law. *See* Docket
21 No. 62 (Pl.’s Supp. Filing, Ex. A) (Loan Purchase Agreement § 8) (providing that “[t]his Agreement
22 and the Seller’s Guide shall be construed in accordance with the laws of the State of New York and
23 the obligations, rights and remedies of the parties hereunder shall be determined in accordance with
24 the laws of the State of New York, except to the extent preempted by Federal law”); Baker Decl.,
25 Ex. A (Seller’s Guide § 713.1) (providing that “[t]he Loan Purchase Agreement shall be construed in
26 accordance with the substantive law of the State of New York and the obligations, rights and
27 remedies of the parties shall be determined in accordance with such law without regard for the
28 principles of conflict of laws”).

1 “Under New York law, a breach of contract claim requires proof of (1) an agreement, (2)
2 adequate performance by the plaintiff, (3) breach by the defendant, and (4) damages.” *Fischer &*
3 *Mandell LLP v. Citibank, N.A.*, 632 F.3d 793, 799 (2d Cir. 2011); *see also Harris v. Seward Park*
4 *Housing Corp.*, 913 N.Y.S.2d 161, 162 (2010) (noting that elements of breach of contract claim
5 under New York law “include the existence of a contract, the plaintiff’s performance thereunder, the
6 defendant’s breach thereof, and resulting damages”). The Court finds that LBHI has sufficiently
7 alleged in its complaint a breach of contract. More specifically, LBHI has pled (1) that IZT entered
8 into the Loan Purchase Agreement with LBB and that LBB subsequently assigned its rights and
9 remedies under the agreement to LBHI; (2) that LBB/LBHI substantially performed their obligations
10 under the agreement; (3) that IZT breached the agreement (Section 703 of the Seller’s Guide)
11 because it represented that the application for loan ****2129 did not contain an untrue statement of
12 fact when it in fact did (*i.e.*, the loan application for loan ****2129 stated that the borrower’s
13 monthly income was \$8,655.00 when it was actually \$2,068); (4) that IZT further breached the
14 agreement (Section 710 of the Seller’s Guide) because it refused to repurchase the loan and/or
15 indemnify LBB/LBHI; and (5) that LBB/LBHI suffered damages as a result.

16 As for a claim for breach of an express warranty, “a plaintiff must make a showing of the
17 following four elements . . . : ‘(1) plaintiff and defendant entered into a contract; (2) containing an
18 express warranty by the defendant with respect to a material fact; (3) which warranty was part of the
19 basis of the bargain; and (4) the express warranty was breached by defendant.’” *LaSalle Bank Nat’l*
20 *Ass’n v. Merrill Lynch Mortg. Lending, Inc.*, No. 04 Civ. 5452 (PKL), 2007 U.S. Dist. LEXIS
21 59303, at *23 (S.D.N.Y. Aug. 13, 2007). Here, too, LBHI has adequately pled a claim for relief.
22 More specifically, it has alleged in the complaint (1) that IZT entered into the Loan Purchase
23 Agreement with LBB and that LBB subsequently assigned its rights and remedies under the
24 agreement to LBHI; (2) that the agreement contained an express warranty that the application for
25 loan ****2129 did not contain an untrue statement of fact (Section 703 of the Seller’s Guide); (3)
26 that the warranty was part of the basis of the bargain between IZT and LBB,² and (4) that the

27 ² *See also* Seller’s Guide § 701 (providing that “[IZT] acknowledges that Mortgage Loans
28 are purchased in reliance upon: (i) the truth and accuracy of [IZT’s] representations and warranties
in the Loan Purchase Agreement and this Seller’s Guide . . .”).

1 warranty was breached because the application for loan ****2129 did contain an untrue statement of
2 fact, *i.e.*, what the borrower’s monthly income was.

3 Because LBHI has adequately pled both a claim for breach of contract and a claim for breach
4 of an express warranty, the second and third *Eitel* factors also weigh in favor of default judgment.

5 Taking into account the *Eitel* factors discussed above as well as IZT’s failure to obtain
6 counsel, the Court concludes that a default judgment in favor of LBHI is appropriate.

7 B. Damages

8 Because the Court concludes that default judgment is warranted, it must determine what
9 damages are appropriate. LBHI has the burden of “proving up” its damages. *See Board of Trustees*
10 *of the Boilermaker Vacation Trust v. Skelly, Inc.*, 389 F. Supp. 2d 1222, 1226 (N.D. Cal. 2005)
11 (“Plaintiff has the burden of proving damages through testimony or written affidavit.”).

12 As discussed above, IZT breached the Loan Purchase Agreement – more specifically,
13 Section 703 of the Seller’s Guide – when it represented that the loan application for loan ****2129
14 did not contain an untrue statement of fact when it actually did (*i.e.*, what the borrower’s monthly
15 income was). Under the Seller’s Guide, in the event of a breach of Section 703, “[IZT] shall, at
16 [LBB/LBHI’s] option, repurchase the related Mortgage Loan . . . at the Repurchase Price.” Baker
17 Decl., Ex. A (Seller’s Guide § 710). Consistent with the Seller’s Guide, the damages requested by
18 LBHI are the Repurchase Price.

19 The term “Repurchase Price” is defined in the Seller’s Guide as follows:

20 An amount equal to (i) the greater of the Purchase Price or par
21 multiplied by the outstanding principal balance of the Mortgage Loan
22 as of the Purchase Date; less (ii) the aggregate amount received by
23 [LBB/LBHI] of reductions and curtailments of the principal balance of
24 the Mortgage Note; plus (iii) any and all interest payable on the
25 outstanding principal balance of the Mortgage Note as of the date of
26 repurchase; plus (iv) any and all expenses, including, without
27 limitation, costs of foreclosure and reasonable attorney’s fees, incurred
28 by [LBB/LBHI] in the exercise by [LBB/LBHI] of its rights and
remedies in connection with the Mortgage Loan, the Mortgaged
Property, and/or the Mortgagor, as more specifically defined in this
Seller’s Guide.

27 Baker Decl., Ex. B (Seller’s Guide § 8) (defining “Repurchase Price”). LBHI has provided a
28 declaration from John Baker, an employee of one of its subsidiaries, which calculates the

1 Repurchase Price as defined above based on the business of records of LBB, LBHI, and one of their
2 agents. The Court has reviewed the Baker declaration and finds that it substantiates LBHI’s claim
3 that the Repurchase Price is \$289,791.85. *See* Baker Decl. ¶ 18. The Court notes that the
4 Repurchase Price takes into account the fact that LHBI obtained some money from the liquidation of
5 loan ****2129, *i.e.*, when the property securing the loan was sold through the REO process. *See id.*
6 ¶ 13 & Ex. D (reflecting sale proceeds of \$165,536.91).

7 In addition to the Repurchase Price, LBHI seeks as part of its damages prejudgment interest.
8 As noted above, the Seller’s Guide provides that New York law is applicable. Under New York
9 law, prejudgment interest is a part of damages in a breach of contract case. *See* N.Y.C.P.L.R. §
10 5001(a) (providing for interest to verdict, report, or decision in breach of contract case); *id.* § 5002
11 (providing for interest from verdict, report, or decision to judgment). The statutory rate is nine
12 percent per year. *See id.* § 5004 (providing that “[i]nterest shall be at the rate of nine per centum per
13 annum, except where otherwise provided by statute”). Interest is

14 computed from the earliest ascertainable date the cause of action
15 existed, except that interest upon damages incurred thereafter shall be
16 computed from the date incurred. Where such damages were incurred
17 at various times, interest shall be computed upon each item from the
18 date it was incurred or upon all of the damages from a single
19 reasonable intermediate date.

20 *Id.* § 5001(b).

21 In its papers, LBHI asserts that the earliest ascertainable date that its claims existed was the
22 day that loan ****2129 was liquidated – *i.e.*, the day that the property securing the loan was sold.
23 That day appears to be September 24, 2008. *See* Baker Decl., Ex. F (column 14); *see also id.*, Ex. E
24 (letter) (stating that the “loan liquidated on September 10, 2008 through the REO process”).
25 Arguably, the date that the claims existed was earlier, but LBHI has made no argument to that effect.
26 It seems fair to say that, at the very least, the claims existed on the day that the property was sold.
27 Presumably, the property would not have been sold but for the borrower’s inability to pay the
28 mortgage with her income.

Interest is calculated on the Repurchase Price of \$289,791.85 (as that sum takes into account
the sale of the property on September 10, 2008). Nine percent of \$289,791.85 is approximately

1 \$26,081.27. Thus, interest expressed at a daily rate is \$71.46 (*i.e.*, \$26,081.27 ÷ 365 days). There
2 are 988 days between September 24, 2008, and the date of final judgment (June 9, 2011). Thus
3 prejudgment interest is \$70,602.48.


4 **III. CONCLUSION**

5 For the foregoing reasons, the Court grants LBHI's motion for default judgment and awards
6 LBHI damages in the amount of \$360,394.33 which represents the Repurchase Price of \$289,791.85
7 and \$70,602.48 in prejudgment interest.

8 This order disposes of Docket No. 60. The Clerk of the Court is directed to enter judgment
9 in accordance with this opinion and close the file in this case.

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11 IT IS SO ORDERED.

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13 Dated: June 9, 2011

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16 EDWARD M. CHEN
17 United States District Judge
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