

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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EFFINGHAM JAMES ,

Docket No. 05 CV 2593
(TCP)(AKT)

Plaintiff,

- against -

ODRA N. ARANGO, FFFC f/n/o FIRST FRANKLIN
FINANCIAL GROUP, NATIONAL CITY HOME LOAN
SERVICES INC., A&A GLOBAL RESOURCES INC.,
aka GLOBAL RESOURCES LTD., ANN ALVAREZ,
ALFRED MILLS, DISCOUNT FUNDING
ASSOCIATES, WALLY DUVAL, and CHARLES
LIECHTUNG a.k.a CHAIM LIECHTUNG,

Defendants.

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DECLARATION OF TIMOTHY J. FIERST

TIMOTHY J. FIERST, an attorney duly licensed and admitted to practice in and before the Courts of the State of New York and admitted to the bar of this Court, declares the following to be true pursuant to 28 U.S.C. § 1746:

1. I am counsel to the law firm of Buchanan Ingersoll PC, attorneys for the defendants FFFC f/n/o First Franklin Financial Group ("FFFC") and National City Home Loan Services, Inc. ("National City") in the above-captioned action. I am fully familiar with and have personal knowledge of the facts and circumstances set forth herein.

2. I respectfully submit this declaration in support of FFFC and National City's motion for an order pursuant to Fed. R. Civ. P. 55(c) vacating the Clerk's entry of default dated

May 26, 2006 (the "Clerk's Default") and in opposition to the plaintiff's request for the entry of a default judgment..

3. The purpose of this Declaration is to, *inter alia*, identify and set forth for the Court the documentary evidence relied upon by FFFC and National City in support of its pending motion and to present to the Court the salient facts that dictate in favor of FFFC and National City's request to vacate the default and against Plaintiff's request for entry of a default judgment.

4. Upon information and belief, on or about May 15, 2002, the plaintiff Effingham James ("James") and the defendant Odra N. Arango ("Arango") entered into a contract of sale for the premises located at 119-47 166th Street, Jamaica, New York (the "Premises"). A copy of the contract of sale is annexed hereto as Exhibit "A."

5. On or about May 29, 2002, FFFC, at the request of Arango, loaned to Arango the principal amounts of One Hundred Ninety Six Thousand Dollars and 00/100 Cents (\$196,000.00) (the "First Loan") and Forty Nine Thousand Dollars and 00/100 Cents (\$49,000.00) (the "Second Loan").

6. In connection with the First Loan and the Second Loan, Arango executed in favor of, and delivered to, FFFC an Adjustable Rate Note (the "\$196,000.00 Note") and a Note (the "\$49,000.00 Note") each dated May 29, 2002 (collectively, the "Notes"). Copies of the Notes are annexed hereto as Exhibit "B."

7. The \$196,000.00 Note is secured by a Mortgage executed by Arango and delivered to FFFC dated May 29, 2002 (the "\$196,000.00 Mortgage"). A copy of the \$196,000.00 Mortgage is annexed hereto as Exhibit "C." The \$49,000.00 Note is secured by a Mortgage executed by Arango and delivered to FFC dated May 29, 2002 (the "\$49,000.00

Mortgage") (collectively, the "Mortgages"). A copy of the \$49,000.00 Mortgage is annexed hereto as Exhibit "D."

8. The proceeds of the Mortgages were distributed in accord with the instructions provided by both James and Arango. In fact, the HUD-1 Settlement Statements summarizing the manner in which the proceeds of the Mortgages were disbursed were approved and executed by both James and Arango. A copy of the HUD-1 Settlement Statement is annexed hereto as Exhibit "E."

9. Further, all commissions paid at the closing of the Mortgages were authorized by a signed commission agreement from James. A copy of the signed commission agreement is annexed hereto as Exhibit "F."

10. On or about April 27, 2004, James commenced an action in the New York State Supreme Court in and for the County of Queens under index number 9644/04 seeking judgment voiding the sale of the Premises to Arango and voiding the Mortgages (the "Related Action"). A copy of the summons and complaint for the Related Action is annexed hereto as Exhibit "G."

11. Thereafter, James commenced this action on May 27, 2005 seeking the same relief as that demanded in the Related Action. *See* Court's Dkt. #1.

12. On July 18, 2005, FFFC and National City filed an answer to this action. *See* Court's Dkt. #3.

13. By order of the Honorable Thomas C. Platt dated December 15, 2005, the complaint filed in this action was dismissed and James was given fifty (50) days within which to file an amended complaint. *See* Court's Dkt. # 16.

14. The amended complaint was filed on February 4, 2006, the fifty-first (51st) day and is thus untimely and should be dismissed. A copy of the amended complaint is annexed hereto as Exhibit "H."

15. Based upon conversations and an agreement reached with counsel for James, an Answer to the amended complaint was filed on behalf of FFFC and National City on May 31, 2006. A copy of the answer is annexed hereto as Exhibit "I."

16. Annexed hereto as Exhibit "J," is a copy of my telephone log, kept in the ordinary course of business. This telephone log corroborates the dates and times of my conversations with counsel for James.

17. In support of James' specious attempt to have a default entered against FFFC and National City, James' counsel submitted an Affirmation of Service which is conspicuously silent with respect to the date upon which the amended complaint was allegedly served. This Affirmation of Service was filed with the Court on May 24, 2006. A copy of the Affirmation of Service is annexed hereto as Exhibit "K."

18. A copy of the transcript from the deposition of Charles Liechtung taken in the Related Action is annexed hereto as Exhibit "L."

19. A copy of the transcript of the deposition of Arango taken in the Related Action is annexed hereto as Exhibit "M."

20. A copy of the transcript of the deposition of Michael Besko, a manager of FFFC, taken in the Related Action, is annexed hereto as Exhibit "N."

A. Neither FFFC nor National City are in Default in this Action.

21. I have been in regular contact with Steven Isser, Esq., counsel for the defendant Charles Liechtung since this action was filed in 2005. Mr. Isser submitted a motion to dismiss the initial complaint filed in this action. *See* Court's Dkt. # 9.

22. Although I was unaware of the return date of Mr. Isser's motion, Mr. Isser advised me of the Court's December 15, 2005 decision which, among other things, dismissed the complaint yet provided James with leave to file an amended complaint within fifty (50) days thereafter. *See* Court's Dkt. # 16.

23. During my various conversations with Mr. Isser, I inquired as to whether he received an amended complaint in this action. Mr. Isser advised me that when he did receive an amended complaint, he anticipated moving for dismissal once again.

24. Thereafter, on March 6, 2006 at 11:02 a.m. I contacted counsel for James and advised him that I had not yet received a copy of the amended complaint. *See* Ex. J. Notwithstanding my telephone call to counsel, counsel did not forward a copy of the amended complaint to me.

25. Thereafter, I received a copy of a motion to dismiss submitted by Mr. Isser as counsel for Liechtung. To date, I have not received a copy of any opposition submitted by counsel for James, nor have I received an amended complaint from counsel for James.

26. On May 23, 2006, a conference in the Trial Scheduling Part of the New York State Supreme Court, Queens County was held for the Related Action. *See* Ex. G.

27. I appeared at the conference. Mr. Rufai, counsel for James, failed to appear or check in with the clerk.

28. The conference for the Related Action was adjourned until June 8, 2006 and I was directed to advise counsel for James of the adjourned date.

29. Thereafter, three (3) separate times on May 23, 2006 and once on May 24, 2006, I telephoned counsel for James to (i) advise him of the rescheduling of the conference in the Related Action and (ii) inquire on the status of his opposition to the motion to dismiss and to confirm that I did not have the amended complaint. *See Ex. J.*

30. On May 25, 2006, counsel for James returned my call. He advised that he was responding to Mr. Isser's motion to dismiss and I should not be concerned. Counsel further advised that he was aware of the rescheduled date of the conference in the Related Action, and inquired when he could expect an answer to the amended complaint.

31. I once again advised counsel that he did not serve a copy of the amended complaint upon me. Notwithstanding that fact, I indicated that he would have an answer to the amended complaint by the end of the next week. Counsel acquiesced.

32. Indeed, an answer to the amended complaint was served and filed on behalf of FFFC and National City on May 31, 2006. *See Court's Dkt. #23; see Ex. I.*

33. However, notwithstanding my telephone calls to counsel on May 23 and 24, 2006, on May 24, 2006, three and one-half months later, counsel for James electronically filed a return of summons purporting to indicate that FFFC and National City were served with the amended complaint on February 7, 2006. *See Court's Dkt. #21; see Ex. K.*

34. The Affirmation of Service filed by counsel for James is conspicuously silent with respect to the date on which he alleges the amended complaint was served. *See Ex. K.*

35. In a further attempt at subterfuge, counsel for James also submitted a request for the entry of the Clerk's Default on May 26, 2006. *See Court's Dkt. # 26.*

36. Upon receipt of notification of these attempts by counsel for James, I immediately wrote to counsel requesting the withdrawal of these improper filings. To date, I have received no response from counsel. *See* Court's Dkt. #24.

37. James' silence for three and one-half months after filing the amended complaint is deafening. Notwithstanding my repeated requests for a response from counsel for a copy of the amended complaint, none was forthcoming.

38. Only after counsel's failure to appear at the conference in the Related Action did he finally respond to my inquiries.

39. Further, notwithstanding our conversations and an agreement that an answer would be forthcoming by June 2, 2006, counsel for James "ran to the courthouse at the last hour" and filed a document which is speculative at best. *See* Ex. K. There is no indication that any service of the amended complaint took place. Moreover, the diligence of counsel is questionable.

40. FFFC and National City timely filed an answer to the complaint in this action (Court's Dkt. #3) clearly showing that neither FFFC nor National City intended to default in this action. Further the answer to the amended complaint was filed in accord with the understanding of James' counsel.

41. Based upon the foregoing, the alleged "default" is clearly excusable. There is no prejudice to James, since James would merely be required to litigate the merits of this matter, or lack thereof. Clearly, FFFC and National City have defenses to this action as indicated within the Affidavit of Vivian Hansen, the Supplemental Affidavit of Vivian Hansen and the Affidavit of Nailah K. Byrd submitted herewith.

42. Counsel's attempt at subterfuge should not be condoned, and his attempt to procure a default judgment should be denied. Additionally, the Clerk's Default should be vacated.

I declare under penalty of perjury that the foregoing is true and accurate.

Executed on June 19, 2006.

/s/
TIMOTHY J. FIERST