

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS ZIMMERMAN and PATRICIA ZIMMERMAN,

Plaintiffs,

v.

GREG LOGEMANN, 1st RATE MORTGAGE CORP.,
GRETТА HAUN, BOARDWALK REALTY, INC.,

Defendants,

OPINION AND ORDER

COUNTRYWIDE BANK, N.A., and
AMERICA'S WHOLESALE LENDER,

09-cv-210-slc

Defendants and Third-Party Plaintiffs,

v.

TRI-COUNTY TITLE & ABSTRACT, LLC and
TERRI S. OSWALD,

Third-Party Defendants.

Plaintiffs Thomas and Patricia Zimmerman filed this case in 2009 seeking to recover damages and equitable relief for alleged fraud and statutory violations committed by nearly everyone involved in an ill-advised home loan. The claims against all defendants but one, defendant 1st Rate Corporation, have been disposed of by summary judgment or stipulation. Dkts. 248, 255. 1st Rate has not participated in these proceedings or discovery since terminating its lawyers in October 2010; as a result, judgment on liability has been entered against it. Dkts. 248, 253.

Now before the court is plaintiffs' motion for default judgment against defendant 1st Rate Mortgage Corporation in the amount of \$9,891. Dkt. 256. This amount represents the total of the following: \$896 in attorney fees incurred by plaintiffs in connection with an

October 28, 2010 motion to compel discovery, dkt. 161; \$2,030 in attorney fees incurred in connection with a motion for sanctions against 1st Rate for failing to comply with this court's November 9, 2010 order to provide that discovery, dkt. 245; and \$6,965 in damages on plaintiffs' claim under the Credit Repair Organizations Act, 15 U.S.C. § 1679b(a). 1st Rate opposes the motion, but it still has no lawyer; its opposition was filed by its representative, Justin Thayse. Dkt. 259.

Although plaintiffs have styled their motion as a motion for default judgment, that is somewhat of a misnomer. 1st Rate initially appeared in this lawsuit and filed an answer; to the extent it has "defaulted," it has been by failing to oppose plaintiffs' motions for summary judgment and Rule 37(b) sanctions. What plaintiffs appear to be seeking is summary judgment under Fed. R. Civ. P. 56 on their claim for damages under the Credit Repair Organizations Act, and for any monetary judgment in this case to include attorney fees incurred in seeking relief from the court for 1st Rate's failure to comply with discovery. It appears that plaintiffs are no longer seeking damages on any of their other claims against 1st Rate.

Framed in that context, plaintiffs' motion will be granted. 1st Rate's opposition to the motion was not filed by licensed counsel and therefore must be disregarded. Even if I were to consider it, however, nothing therein persuades me that it would be unfair to award plaintiffs the relief they seek.

BACKGROUND

A bit of procedural history is helpful to put the present motion in context. 1st Rate originally appeared in this case through counsel, who also was representing 1st Rate's former employee, defendant Greg Logemann. On January 27, 2010, I issued a pretrial conference order

that established various dates and schedules in the case. Dkt. 101. The order specified that responses to dispositive motions were to be filed and served within 21 calendar days of service of the motion, and that responses to discovery-related motions were to be filed and served within 7 calendar days of service of the motion. *Id.*, at 3, 5. The deadlines set forth in the scheduling order were amended on September 7, 2010. Dkt. 155.

On October 1, 2010, counsel for defendants 1st Rate and Logemann moved to withdraw from the case, asserting that their clients could no longer afford to pay them and had instructed them to stop all work. Dkts. 157-158. On October 28, 2010, I granted the motion. Dkt. 162. Meanwhile, plaintiffs had filed a motion to compel discovery responses from 1st Rate. Dkt. 161. On November 9, 2010, I held a telephonic hearing on the motion, at which 1st Rate appeared without counsel. I informed 1st Rate's representative, Justin Thayse, that the only way the corporation could participate in the case was through counsel, but that he would be allowed to remain on the phone and listen to the hearing. Hearing Transcript, dkt. 261, at 4-5 (The transcript identifies Thayse as "Faze"). I granted plaintiffs' motion to compel and ordered 1st Rate to produce the requested discovery not later than November 19, 2010; further, I informed plaintiffs that they could seek additional remedies under Fed. R. Civ. P. 37(b) in the event 1st Rate did not comply. Plaintiffs were given until November 19, 2010 to submit their itemized bill on their request for cost-shifting; 1st Rate was given until November 26, 2010 in which to respond. Dkt. 164.

On November 17, 2010, plaintiffs submitted their itemized bill for \$896; 1st Rate did not respond. Dkt. 165, 166.

The parties, including 1st Rate, attended mediation with Magistrate Judge Peter Oppeneer on November 30, 2010, but were unable to reach a settlement. Dkt. 171.

On January 3, 2011, plaintiffs filed and served a motion for partial summary judgment on their claims that defendants 1st Rate and Logemann violated Wis. Stat. § 224.79 and the Credit Repair Organizations Act, 15 U.S.C. §1679b. Dkt. 207. Defendant Logemann responded to the motion, dkt. 224, 225; 1st Rate did not. In an order entered March 17, 2011, I granted plaintiffs' motion for summary judgment on the statutory claims asserted against Logemann and 1st Rate, but made clear that it would be plaintiffs' burden at trial to prove damages. Dkt. 248.

Meanwhile, on March 10, 2011, plaintiffs filed a motion for sanctions against 1st Rate for its failure to comply with this court's November 9, 2010 order compelling discovery. Dkt. 245. On April 11, 2011, I entered a text only order granting the motion. As a sanction, I entered default judgment against 1st Rate on plaintiffs' claims for liability, but advised that it would still be plaintiffs' burden at trial to prove that they were entitled to damages or any other relief from 1st Rate.¹ Dkt. 253. I did not rule on plaintiffs' request for expenses incurred in bringing that motion.

On April 26, 2011, I entered an order accepting plaintiffs' stipulation to dismiss their claims against Logemann. Dkt. 255. That same date, the court scheduled a telephonic status conference for May 6, 2011 at 9 a.m.

¹ Although summary judgment against 1st Rate had already been granted to plaintiffs on their claims under the Credit Repair Organizations Act and Wisconsin's law governing mortgage broker agreements, still remaining for trial were plaintiffs' claims against 1st Rate and Logemann for fraud and deceptive trade practices. In hindsight, the text-only order should have read "plaintiffs' *remaining* claims for liability."

On May 5, 2011, plaintiffs filed the instant motion for default judgment for damages against 1st Rate on their claim under the Credit Repair Organizations Act, indicating that it was seeking such relief in lieu of a trial on the remaining claims. Dkt. 256. In support of their motion, plaintiffs submitted a computation of damages owed under the statute. Plaintiffs also asked the court to award them their attorney fees incurred in connection with the motion to compel discovery and the subsequent motion for sanctions. *Id.*

Plaintiffs appeared for the May 6 telephonic hearing; 1st Rate did not. I set a deadline of May 19, 2011 for 1st Rate to file a response to the motion, if it chose to do so. Dkt. 258.

On May 20, 2011, Thayse filed a letter in opposition to the motion. Thayse asserted that 1st Rate had a limited ability to respond to plaintiffs' allegations because "1st Rate has not been included in any correspondence after the such [*sic*] date of November 30th when we attended the Mediation." Dkt. 259, at 1. He also indicated that after 1st Rate had released its lawyer in late 2010, the company had "been unable to retrieve the documentation that was given to our former counsel so we have had limited ability to retrieve any paperwork." *Id.* In addition, Thayse offered a number of arguments as to why 1st Rate had no liability in the case. He offered no opposition to plaintiffs' claimed damages amounts.

In reply, plaintiffs responded that they have provided copies of all documents to 1st Rate's representatives. In addition, they pointed out that 1st Rate's response should be disregarded because it had not been filed by a lawyer. Dkt. 260.

OPINION

I agree with plaintiffs that because Thayse cannot represent 1st Rate in federal court, I must disregard his May 20, 2011 letter. *Rowland v. California Men's Colony*, 506 U.S. 194, 201-02 (1993); *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 924 (7th Cir. 2003) (corporation may appear in federal court only through licensed counsel). Even if I were to consider it, however, it would not make a difference.

First, Thayse asserts that 1st Rate has had a limited ability to respond to plaintiffs' allegations because "1st Rate has not been included in any correspondence after the such [sic] date of November 30th when we attended the Mediation." Dkt. 259, at 1. Although it is unclear to what "correspondence" Thayse is referring, it does appear that this court might have failed inadvertently to mail 1st Rate a copy of all electronic orders or notices that were entered in this case. Nevertheless, it is *not* true that 1st Rate has had no notice that judgment might be entered against it. Plaintiffs assert that they provided all documentation to 1st Rate, dkt. 260, and they filed certificates of service showing that they served their motion for partial summary judgment and motion for sanctions on 1st Rate. Dkt. 217, 247. Presumably, 1st Rate had a copy of this court's pretrial conference order, which establishes deadlines for responding to such motions, yet 1st Rate filed no response. Dkt. 101. Accordingly, Thayse's suggestion that 1st Rate had no knowledge of what was going on in this case rings hollow.

Second, even assuming for the sake of argument that 1st Rate did not receive notice of the motions for summary judgment or sanctions, as a practical matter, this made no difference in the proceedings or the outcome because 1st Rate had abandoned its defense of this lawsuit. Since firing its lawyers in October 2010, 1st Rate has never, not even now, indicated that it was

seeking new (perhaps less expensive) counsel and it has never asked for time in which to do so. Without counsel, 1st Rate could not have responded to the motions. In other words, 1st Rate could not have been prejudiced by the lack of notice because, by firing its lawyers, it had effectively opted not to respond to the motions anyway.

Thayse insists that 1st Rate did not do anything wrong to the Zimmermans and that it was “unable” to retrieve documentation from its former counsel. The time and manner in which to have made such arguments, however, was to have retained counsel oppose the motions for summary judgment and Rule 37(b) sanctions, motions that were filed and granted months ago. 1st Rate’s decision to go counsel-free effectively sealed its current fate.²

It follows that plaintiffs’ motion for summary judgment on damages is unopposed. Plaintiffs have supported their claim for damages with citations to evidence in the record and to the CROA’s penalty provision, 15 U.S.C. § 1679g, which appears on its face to authorize the relief plaintiffs seek. Hearing no opposition from 1st Rate, I will grant plaintiffs’ motion and award damages in the amount of \$6,965.

As for the requests for attorney fees incurred in conjunction with past motions for discovery violations, those too are unopposed. I have reviewed the itemized billing statements submitted by counsel and find the fees stated therein to be reasonable. Accordingly, plaintiffs will be awarded \$896 in attorney fees incurred by plaintiffs under Rule 37(a)(5)(A) in connection with their October 28, 2010 motion to compel discovery, and \$2,030 in attorney fees as a sanction allowed under Rule 37(b)(2)(C).

² This actually might have been the most rational business decision for 1st Rate to make in this case. Its lawyers might have won the lawsuit, but at what cost? They weren’t working for free. The outcome 1st Rate faces now may end up costing it less than if it had continued with counsel.

ORDER

IT IS ORDERED that the clerk of court shall enter final judgment in favor of plaintiffs in the amount of \$6,965, plus \$896 in attorney fees incurred by plaintiffs under Rule 37(a)(5)(A) in connection with their October 28, 2010 motion to compel discovery, plus \$2,030 in additional attorney fees as a sanction under Rule 37(b)(2)(C) for 1st Rate's failure to provide that discovery.

If defendant 1st Rate wishes to move for reconsideration of this order, it must do so not later than July 31, 2011. The court will not consider any motion in this case that is not filed by a licensed attorney.

Entered this 14th day of July, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge