

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

REAL PROPERTY LOCATED AT
1112 MONROE STREET, SAUK
CITY, SAUK COUNTY, WISCONSIN,
WITH ALL APPURTENANCES AND
IMPROVEMENTS THEREON,

Defendant.

ORDER

03-C-0236-C

In this civil forfeiture action, this court awarded plaintiff United States of America default judgment against defendant real property. Plaintiff alleged that defendant real property was used in connection with a violation of the Uniform Controlled Substances Act, 21 U.S.C. §§ 801 et seq., and therefore, was forfeitable to the United States under 21 U.S.C. § 881(a)(7). Before the court is claimant National City Home Loan Services, Inc.'s motion to reopen the default judgment and enlarge the time to answer plaintiff's second amended complaint.

Plaintiff served its complaint upon defendant real property owner Rick A. Mellentine

on May 9, 2003, and filed a *lis pendens* against defendant real property with the Sauk County Register of Deeds on May 14, 2003. JPMorgan Chase Bank was the mortgage holder of record, but was not named in the complaint or served with a copy of it. On June 9, 2003, plaintiff filed an amended complaint naming JPMorgan Chase Bank as a potentially interested party. Plaintiff ran notices of the action for three consecutive weeks from August 15, 2003 to August 29, 2003 in The Baraboo News Republic, Baraboo, Wisconsin. These notices stated that any potential claimant should file a claim in the action within thirty days of publication.

Upon receiving the original complaint, claimant Mellentine sought to refinance defendant real property through First Franklin Financial Corporation. First Franklin paid defendant Mellentine's outstanding loan balance and acquired a mortgage interest in defendant real property on September 4, 2003. It recorded the transaction with the Sauk County Register of Deeds on September 18, 2003. First Franklin contends that it was unaware of the pending forfeiture action when it refinanced the mortgage.

On September 9, 2003, JPMorgan Chase Bank erroneously petitioned this court to recognize its mortgage interest in defendant real property, but withdrew its petition on October 9, upon realizing that First Franklin had paid off the mortgage in full. Plaintiff performed another title search on September 23, 2003, and learned of the First Franklin mortgage. On November 5, 2003, plaintiff amended its complaint, removing JPMorgan

Chase Bank and adding First Franklin as a potentially interested party.

Plaintiff served its second amended complaint on First Franklin's registered agent, CT Corporation, on November 21, 2003. CT Corporation forwarded the complaint to First Franklin on November 28, 2003. At some point, First Franklin assigned the loan to the putative claimant, National City Home Loan Services, Inc. This assignment has not yet been recorded with the Sauk County Register of Deeds. First Franklin believes that it forwarded the second amended complaint to claimant upon receipt, but concedes that it may not have done so. National City either never received the second amended complaint or misplaced it. On December 31, 2003, plaintiff moved for default judgment against First Franklin after First Franklin failed to file a claim indicating its interest in defendant property or an answer to plaintiff's complaint. This court granted plaintiff's motion on January 5, 2004. National City first learned of the forfeiture action on January 28, 2004, when First Franklin notified it of the default judgment.

National City asks this court to vacate the entry of default judgment pursuant to Fed. R. Civ. P. 60(b)(1) and enlarge the time to answer pursuant to Rule 6(b)(2). Rule 60(b) provides that "on motion and upon such terms as are just, the court may relieve *a party or party's legal representative* from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." (Emphasis added). Thus, the first question is whether National City is a party or a party's legal representative entitled to relief under rule

60(b).

In order to qualify as a party in a forfeiture action, a claimant must file a claim of interest. U.S. v. 8136 S. Dobson Street, Chicago, Ill., 125 F.3d 1076, 1082 (7th Cir. 1997). “If no claim is filed, a putative claimant lacks standing to contest a forfeiture.” Id. (quoting United States v. One Urban Lot, 978 F.2d 776, 778 (1st Cir. 1985)). In United States Currency in the Amount of \$2,857.00, 754 F.2d 208, 212-13 (7th Cir. 1985), the Court of Appeals for the Seventh Circuit explained the process for challenging a forfeiture action:

Any claimant of property that is the subject of a judicial condemnation proceeding must file a claim within ten days after process has been executed or within such additional time as may be allowed by the court, and must file an answer within twenty days after the filing of the claim. See Fed.R.Civ.P., Supp. Rule C(6). The claim “shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action.” Id. Once the procedural requirements of Rule C(6) are met, a claimant has standing to defend the forfeiture.

Only two claims have been filed in this action: one by Mellentine and one, which was later withdrawn, by JPMorgan Chase Bank. Because National City has not filed a claim, it is not a party to this action. Moreover, National City has not suggested that it is a legal representative of the single remaining claimant Mellentine. See 8136 S. Dobson Street, 125 F.3d at 1083 (“The term legal representative was intended to reach only those individuals who were in a position tantamount to that of a party or whose legal rights were otherwise

so intimately bound up with the parties that their rights were directly affected by the final judgment.”) (quoting Kem Manufacturing Corp. v. Wilder, 817 F.2d 1517, 1520 (11th Cir. 1987)). Accordingly, National City cannot obtain relief under rule 60(b). The order of January 2, 2003, granting the entry of default judgment against First Franklin will not be vacated and National City’s motion will be denied. Further, National City will not be granted an enlargement of time to file an answer. “Before a claimant in a forfeiture case can file an answer and defend on the merits, a claim must be filed.” 8136 S. Dobson Street, 125 F.3d at 1082.

The deadline for filing a verified claim has passed. See Fed. R. Civ. P., Supp. Rule C(6)(a)(i)(A) (generally, claim must be filed “within 30 days after the earlier of (1) the date of service of the Government’s complaint or (2) completed publication of notice under Rule C(4)”). However, district courts have discretion to extend the time in which a putative claimant can file. Fed. R. Civ. P. Supp. Rule C(6)(a)(i)(B). See also United States v. United States Currency, The Amount of \$103,387.27, 863 F.2d 555, 561 (7th Cir. 1988). “Among the factors which have guided that discretion are the time at which the claimant became aware of the seizure, whether the Government encouraged the delay, the reasons proffered for the delay, whether the claimant had advised the court and the Government of his interest in defendant before the claim deadline, whether the Government would be prejudiced by allowing the late filing, the sufficiency of the answer in meeting the basic requirements of a

verified claim, and whether the claimant timely petitioned for an enlargement of time.” U.S. v. One (1) 1979 Mercedes 450SE, 651 F. Supp. 351, 353 (S.D. Fla. 1987) (citations omitted), cited with approval in United States Currency, The Amount of \$103,387.27, 863 F.2d at 561. “Courts also consider whether there has been a good faith effort to comply initially with Rule C(6)’s requirements.” United States Currency, The Amount of \$103,387.27, 863 F.2d at 561.

Although National City’s briefing in support of its Rule 60(b) motion addresses some of these issues, the record is too sparse to permit me to make any determination about the propriety of an enlargement. Foremost, I cannot determine whether National City might have an interest in defendant property because it has not said either in its brief or supporting affidavits when the assignment was made. If the assignment was made after the January 2 order, whereby all right, title and interest of First Franklin in defendant property was conveyed to plaintiff, National City has no interest in defendant property. Accordingly, I will not construe National City’s Rule 60(b) motion as a motion for enlargement of time to file a verified claim. If National City wishes to pursue protection for whatever interest it may have in defendant property, it may petition the court for an enlargement of time in which to file a claim.

ORDER

IT IS ORDERED that National City Home Loan Services, Inc.'s motion to reopen default judgment entered against First Franklin Financial Corporation and enlarge time to answer complaint is DENIED.

Entered this 16th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge