

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

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ALLAN GRANGER and
SUSAN GRANGER,

Plaintiffs,

v.

ALFA LEISURE, INC.,

Defendant/
Third Party Plaintiff,

v.

CRAFT'S TRADING CENTER, INC.,

Third-Party Defendant.

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ORDER

08-cv-39-bbc

In this case brought under Wisconsin's Lemon Law, Wis. Stat. § 218.0171, plaintiffs Allan and Susan Granger contend that a motor home sold to them by defendant Alfa Leisure, Inc. is defective and that defendant failed to repurchase the vehicle, as is required under the statute. Defendant removed this case from state court, asserting this court's diversity jurisdiction. On February 14, 2008, defendant filed its answer to plaintiffs' complaint, and included in it a third-party action against third-party defendant Craft's

Trading Center, Inc. Since then, defendant has gone out of business and ceased communication with its lawyer, Paul Wojcicki.

On May 5, 2008, Wojcicki filed a motion for leave to withdraw as defendant's counsel. On May 6, 2008, I issued an order reserving a decision on that motion. I told defendant that it would have until May 17, 2008 in which to assert any objections it might have to its lawyer's withdrawal, and to assure the court that it understands that in federal court, it cannot defend against plaintiff's suit or prosecute its own third-party claim unless it is represented by counsel. I commented as well that if, by May 17, 2008, defendant failed to respond to the May 6 order, "I [would] assume it has decided to allow judgment to be entered against it on plaintiff's claims and to dismiss its third-party claims against third-party defendant Craft's Trading Center, Inc., with prejudice. In that event, I will direct the clerk of court to enter judgment in favor of plaintiff." That order was sent to the attorneys representing all parties, as well as to two of defendant's board members: Johnnie Crean and Mark Mickelson.

It is now May 27, 2008, ten days past the May 17 deadline, and defendant has not responded to the May 6 order. Therefore, I understand defendant to have no objection to its attorney's motion to withdraw, and I will grant that motion. In addition, I understand defendant's silence to confirm that it has no intention of defending against plaintiffs' claim against it or of pursuing its prosecution of a third-party claim against the third-party

defendant. Under this circumstance, it is proper to dismiss defendant's claim against third-party defendant Craft's Trading Center, Inc. on the court's own motion for defendant's failure to prosecute it. However, despite my comment in the May 6 order that such a dismissal would be "with prejudice," I have reconsidered that matter. In light of the fact that the third-party defendant has not yet answered the third-party complaint, dismissal with prejudice seems overly harsh and inconsistent with Fed. R. Civ. P. 41. The dismissal will be without prejudice.

Likewise, I believe that it was error to suggest that defendant's silence could pave a direct path to entry of judgment in plaintiff's favor. When a party fails to defend against claims made against it in a federal court action, the proper step is to enter the party's default under Fed. R. Civ. P. 55(a) (providing for entry of default "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend" an action) as opposed to entering judgment under Fed. R. Civ. P. 55(b). In this case, because the damages plaintiffs seek is not a "sum certain," I cannot enter judgment for plaintiff until they prove the amount of damages to which they are entitled. As plaintiffs point out, the damages in this case are governed by Wis. Stat. § 218.0171, which allows a prevailing plaintiff to recover "twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorney fees." § 218.0171(7). At this time, there is no evidence before the court regarding the amount of pecuniary damages and costs incurred by

plaintiffs. Therefore, I will hold a hearing at which plaintiffs should be prepared to present admissible evidence regarding the amount of their damages. (Plaintiffs' attorney has submitted his own affidavit, in which he describes the damages incurred by plaintiffs. Dkt. #29, but a lawyer's statements regarding the facts of the case are hearsay and therefore not evidence of damages.)

ORDER

IT IS ORDERED that:

1. The motion of Paul Wojcicki to withdraw as counsel for defendant Alfa Leisure, Inc. is GRANTED;
2. Defendant Alfa Leisure, Inc.'s third-party claim against third-party defendant Craft's Trading Center, Inc. is DISMISSED without prejudice on the court's own motion for defendant's lack of prosecution;
3. The clerk of court is directed to enter default against defendant Alfa Leisure, Inc. with respect to plaintiffs' claims against it; and

4. A hearing will be held on Wednesday, June 11, 2008 at 8:30 a.m. at which plaintiffs may present evidence of the amount of its damages.

Entered this 28th day of May, 2008.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge