



SO ORDERED.

SIGNED this 27 day of April, 2010.

Janice Miller Karlin
JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:)	
)	
NORVAL SEBERT FORTUNE III and)	Case No. 09-41744
KARLA JO FORTUNE,)	
)	
Debtors.)	
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NORVAL SEBERT FORTUNE III and)	
KARLA JO FORTUNE,)	
)	
Plaintiffs,)	
)	
v.)	Adv. No. 10-7003
)	
AMERICAN SIDING & WINDOW SYSTEMS,)	
INC. and COMMUNITY HOME)	
FINANCIAL SERVICES, INC.,)	
)	
Defendants.)	
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ORDER ENTERING DEFAULT AGAINST AMERICAN SIDING & WINDOW
SYSTEMS, INC. AND RESERVING ENTRY OF JUDGMENT
UNTIL CONCLUSION OF ADVERSARY PROCEEDING

This matter is before the Court on Plaintiffs' Motion for Default Judgment¹ against Defendant American Siding & Window Systems, Inc ("American"). Plaintiff contends that although American was properly served with a copy of the summons in this adversary proceeding on February 25, 2010, it has failed to file an answer or other responsive pleading within the 30 days required by Fed. R. Bankr. P. 7012(a), or since. Based upon the failure to timely answer or respond, Plaintiffs have moved for default judgment against American pursuant to Fed. R. Bankr. P. 7055, which incorporates Fed. R. Civ. P. 55, by reference. Plaintiffs do not indicate upon which subsection of Rule 55 they rely for the motion.

American has not responded to the Motion for Default Judgment. However, co-defendant Community Home Financial Services, Inc. ("Community") did respond,² indicating it did not object to the entry of default against American, but contending that the entry of judgment against American would be improper because the two defendants may be subject to joint and several liability in this case. Community further responded that entry of judgment could deprive it of its right to fully defend the Complaint, which it did answer.

The Tenth Circuit Court of Appeals addressed this issue in *Hunt v. Inter-Globe Energy, Inc.*³ In *Hunt*, the plaintiffs brought suit against multiple defendants for alleged securities fraud. After one of the defendants failed to timely file an answer or other responsive pleading, the Court entered default judgment against that defendant in the amount of \$330,000, plus interest, attorney's fees and

¹Doc. 25.

²Doc. 28. Pursuant to D. Kan. LBR 7012.1(b), Plaintiffs had 14 days to reply to Community's response. They elected not to respond, so the Court makes the assumption that Plaintiffs do not disagree with Community's position on their motion.

³770 F.2d 145 (10th Cir. 1985).

court expenses – including \$300,000 in punitive damages. The remaining defendants did respond, and the case proceeded to trial.

After trial, the jury returned a judgment in favor of the plaintiffs in the amount of \$30,000, plus interest, attorney’s fees and court expenses. The Tenth Circuit adopted the rule established by *Frow v. DeLaVega*,⁴ which is described as follows: ““when one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against him until the matter has been adjudicated with regard to all defendants, or all have defaulted.””⁵ If the court were to rule otherwise, “plaintiffs armed with joint and several liability on a single claim could seek to execute on a larger damage award from a party against whom the court awarded a much smaller damage verdict-the situation that occurred here.”⁶

Based upon the *Hunt* decision, the Court finds that the entry of judgment by default against American under Rule 55(b) is improper in this case. Were the Court to enter default judgment against American, Plaintiffs could potentially seek to recover that judgment against Community under a joint liability theory, even if Community prevails in this case.

The Court does find that the entry of default against American under Rule 55(a) is appropriate, although the effect of that entry is limited solely to American and cannot be used against Community in this action. Unlike the case in *Hunt*, the claims in this action carry with them potentially self-executing remedies that are made effective simply upon a finding of fault. For example, if Plaintiffs are able to show that they were not provided with the required notices of their

⁴82 U.S. 552 (1872).

⁵*Hunt*, 770 F.2d at 147 (quoting 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2690, at 455-56 (1983)).

⁶*Id.* at 148.

right to rescind the transaction, then the deadline for filing a notice of rescission is automatically extended from three days to up to three years from the date of the transaction. If Community is successful in showing that the rescission notices were given, then the rescission period would be limited to three days. Community cannot be bound by American's default on this issue.⁷

Judgment pursuant to Rule 55(a) will be entered by default against American, and this adversary proceeding will proceed between Plaintiffs and Community. Following the conclusion of the case, a judgment pursuant to Rule 55(b) will be entered against American in a manner consistent with the outcome of the case between Plaintiffs and Community.

IT IS, THEREFORE, BY THE COURT ORDERED that Plaintiffs' Motion for Default Judgment is granted in part and denied in part. Default is hereby entered against Defendant American Siding & Window Systems, Inc. However, the Court will reserve entry of judgment until the conclusion of this case.

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⁷The discussion of the right to rescind is being offered only as an example of the type of issue that could potentially arise following the entry of default against American. Accordingly, the Court is merely finding that American can no longer defend against this action; it is not finding, for example, that American in fact did, or failed to do, anything substantive alleged in the Complaint. Any rights, liabilities, benefits, or damages that automatically arise based upon a finding of liability against American cannot be used against Community in this case. In other words, Community cannot be prejudiced by the entry of default against its co-defendant in this case.