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IN THE CIRCUIT COURT FOR
THE FOURTH JUDICIAL
CIRCUIT IN AND FOR DUVAL
COUNTY, FLORIDA

CASE NO.: 16-2017-CA-001496

JIMMY RUSHING

Plaintiff,

VS.

AMERICAN SECURITY INSURANCE COMPANY,

Defendant.
_____________________________________/

DEFENDANT'S MOTION TO SET ASIDE DEFAULT AND TO VACATE FINAL DEFAULT JUDGMENT AND ALL SUBSEQUENT ORDERS and MOTION TO COMPEL APPRAISAL

COMES NOW the Defendant, AMERICAN SECURITY INSURANCE COMPANY, by and through its undersigned attorney and files its Motion to Set Aside Default and to Vacate Final Default Judgment and All Subsequent Orders and Motion to Compel Appraisal.

Case History

1. On January 3, 2017, at 5:20 p.m. the Plaintiff, by and through its attorney, invoked the appraisal provision of the insurance policy relevant to this action. Mr. David Graham's faxed letter, which is attached hereto as Exhibit "A" states in its entirety as follows:

Our client is invoking the appraisal provision of the policy and naming Jeffery Pellet as their appraiser. He can be contacted directly at JeffreyPellet@gmail.com or (954) 439-5333. Please contact my office should you have any questions or concerns.

2. On January 3, 2017, at 5:26 p.m. the Plaintiff, by and through its attorney, invoked the appraisal provision of a separate claim also by Jimmy Rushing. Mr. David Graham's faxed letter, which is attached hereto as Exhibit "B" states in its entirety as follows:

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 08/23/2017 01:17:55 PM

Our client is invoking the appraisal provision of the policy and naming Jeffery Pellet as their appraiser. He can be contacted directly at JeffreyPellet@gmail.com or (954) 439-5333. Please contact my office should you have any questions or concerns.

3. The Plaintiff filed his Complaint on March 8, 2017. The Complaint alleged that the Defendant breached the insurance contract by failing to "provide the Plaintiff with a coverage determination for the loss as of March 8, 2017." The Defendant had not explicitly provided the Plaintiff an admission that there was a covered loss. However, the Defendant also did not object to the appraisal demand and continued to work to adjust the claim. Appraisal is not intended to be tool for determining coverage. In Florida, "[a] challenge of [c]overage is exclusively a [j]udicial question." *Midwest Mut. Ins. Co. v. Santiesteban,* 287 So.2d 665, 667 (Fla. 1973). However, "when the insurer admits that there *is* a covered loss," any dispute on the amount of loss suffered is appropriate for appraisal. *Johnson v. Nationwide Mut. Ins. Co.,* 828 So.2d 1021, 1025 (Fla.2002) (quoting *Gonzalez v. State Farm Fire & Cas. Co.,* 805 So.2d 814, 816–17 (Fla. 3d DCA 2000).

4. There were a series of misunderstandings and miscommunications between the Defendant's attorneys in March 2017 as to the status and nature of the parties' dispute as well as division of responsibilities. It appears most likely that there was confusion regarding the two separate, but similar claims (same claimant, same attorney, demands for appraisal made 6 minutes apart, etc.). As a result there was a mistaken belief that the current matter was in the appraisal process and not in active litigation. The necessity to respond to the Plaintiff's Complaint was not calendared.

5. On April 20, 2017, the Clerk entered a Default against the Defendant for failure to file a response. The Court subsequently entered a Final Default Judgment on May 18, 2017.

6. On August 21, 2017, the Defendant was informed that JP Morgan Chase had been served with a Writ of Garnishment seeking to collect on a Final Default Judgment. Immediately upon

learning of the Final Default Judgment, the Defendant acted with all due diligence and contacted the undersigned attorney. The Defendant recognizes that four months have passed since the entry of the Clerk's Default. However, as argued infra, if the Defendant had been given proper notice of the hearing to enter judgment, this matter would have been addressed in late April or early May.

Setting Aside the Default and Final Default Judgment

7. Florida Rule of Civil Procedure 1.500(d) states that "**[t]he court may set aside a default, and if a final judgment consequent thereon has been entered, the court may set it aside in accordance with rule 1.540(b)**." Emphasis added. There is a "principle of liberality in setting aside defaults so that lawsuits may be decided on their merits." *Coquina Beach Club Condominium v. Wagner*, 813 So.2d 1061 (Fla. App., 2002) quoting from *Lindell Motors, Inc. v. Morgan*, 727 So.2d 1112, 1113 (Fla. 2d DCA 1999). "It is well established that under appropriate circumstances courts should liberally set aside defaults so that lawsuits may be determined on their merits." *Bland v. Viking Fire Protection, Inc. of the Southeast,* 454 So.2d 763 (Fla.App. 2 Dist., 1984) citing *North Shore Hospital, Inc. v. Barber*, 143 So.2d 849 (Fla.1962).

8. Florida Rule of Civil Procedure 1.540(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. states as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to

> entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

9. Defendant has demonstrated excusable neglect in its failure to properly calendar the response deadline as there was miscommunication regarding the nature of the parties' dispute. The Plaintiff and Defendant were participating in the appraisal and adjustment process when the Complaint was filed. The Plaintiff's Complaint does not allege that the Defendant refused to participate or cooperate in the appraisal process that he initiated.

10. Defendant has presented a meritorious defense to the Plaintiff's Complaint. The appraisal and adjustment process was underway when the Plaintiff abandoned appraisal.

Defense to Amended Complaint and Motion to Compel Appraisal

11. *Florida Ins. Guar. Ass'n, Inc. v. Castilla*, 18 So.3d 703 (Fla. 4th DCA 2009) held as follows:

> In *Preferred Mutual Insurance Co. v. Martinez*, 643 So.2d 1101 (Fla. 3d DCA 1994), after the insureds and their insurance company could not agree on the amount of their insured loss, the insureds filed suit. The insurer filed a motion to dismiss and compel appraisal which the trial court denied. In reversing, the court held that the insurer had never acted inconsistently with its rights at any point in the proceeding, thus precluding waiver of the right. The court concluded, **"Motions to compel arbitration should be granted whenever the parties have agreed to arbitration and the court entertains no doubts that such an agreement was made."** Id. at 1103. Emphasis added.

Castilla then went on to equate the arbitration terms set forth in *Martinez* with the appraisal process. *Castilla* at 705. The Plaintiff in the case is not only bound by the appraisal provision of the insurance policy, but also specifically invoked the appraisal process by and through his attorney. But for the default, the Court would have been duty bound to compel the parties to complete the appraisal process, allow for an inspection by the Defendant and, if necessary, to name a neutral umpire.

12. The proper course of action in this matter is to continue the appraisal process, allow the Defendant to inspect the property and, if necessary, name an impartial umpire. If the Plaintiff is unwilling, the Court should compel him to do so.

Motion to Vacate Final Default Judgment and Order Granting Plaintiff's *Ore Tenus* Motion for Attorney's Fees and Costs as Void

13. After the Clerk entered its Default against the Defendant, the Plaintiff scheduled a hearing to take place on May 10, 2017. The Notice of Hearing states that the Plaintiff will "call up for hearing the **DEFAULT** entered against Defendant and requesting a Judgment". The Certificate of Service which was digitally signed by the Plaintiff's attorney states that the only party to receive the Notice of Hearing was the Court's Judicial Assistant at laball@coj.net. It is therefore undisputed that the Defendant was not provided a copy of the Notice of Hearing or an opportunity to be heard at the May 10, 2017, hearing.

14. The Court entered a Final Default Judgment on May 18, 2017. The Final Default Judgment included an award to Plaintiff in the amount of $224,199.99 in damages, $6,916.88 in attorney fees and $7,538.88 in costs. All of these awards are based on unliquidated damage claims. A cursory review of the Amended Complaint demonstrates that there are no demands for liquidated damages.

15. Damages are liquidated "when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law." *Bowman v. Kingsland Development, Inc.*, 432 So.2d 660, at 662. Damages are not liquidated, however, "if the ascertainment of their exact sum requires the taking of testimony to ascertain facts upon which to base a value judgment." *Id.* at 663. Claims for reasonable attorney's fees are considered

unliquidated damages. *See id.; see also Latin American Cafeteria, Inc. v. Zales Meats Distributors, Inc.,* 921 So.2d 768, 771 (Fla. 3d DCA 2006).

16. To demonstrate the ascertainment of the exact sum of damages in this case the Plaintiff submitted the Affidavit of the appraiser it chose pursuant to the appraisal provision and his estimate for repairs. The Estimate Report, which was the basis for the Court's value judgment, bears a stamp indicating that it was entered during the May 10, 2017, hearing which took place without the knowledge of the Defendant. The Affidavit of Jeffrey Pellet was electronically filed on May 15, 2017; **5 days after the hearing**. The Affidavit's Certificate of Service does not state that it was provided to the Defendant.

17. The Plaintiff filed his Motion for Costs on May 15, 2017. The Certificate of Service indicates that the Defendant was not provided with a copy of the Motion for Costs. The Court Docket does not show that any notice of hearing was ever filed regarding the Motion for Costs. However, the Order Granting Plaintiff's *Ore Tenus* Motion for Attorney's Fees and Costs was entered by the Court on May 18, 2017.

18. As the Motion for Attorney's Fees was made orally at a hearing the Defendant had no notice of, it was not provided the required notice and opportunity to be heard. The only evidence of costs in the record is in the Affidavit of Plaintiff's attorney. In his Affidavit, Mr. Graham simply states that "total costs in this matter are $7,538.88".

19. *Cellular Warehouse, Inc. v. Gh Cellular*, 957 So.2d 662 (Fla. 4th DCA 2007) holds:

> Where an action involves—as in this case—unliquidated damages, "a party against whom default has been entered is entitled to notice of an order setting the matter for trial, and must be afforded an opportunity to defend." *Viets v. American Recruiters Enterprises, Inc.,* 922 So.2d 1090, 1095 (Fla. 4th DCA 2006). It is irrelevant to this analysis that Cellular Warehouse had notice of the default final judgment after it was entered. **A violation of the due process guarantee of notice and an opportunity to be heard renders a judgment void, and Rule 1.540(b)(4) provides relief from void judgments at any time.** *Viets,* 922 So.2d at 1095

(reversing default final judgment awarding unliquidated damages where judgment was entered upon just the proposed order being sent by mail to the court; plaintiff denied due process); *Hutchison v. Chase Manhattan Bank,* 922 So.2d 311, 315 (Fla. 2d DCA 2006) (where appellant did not receive notice before entry of orders, the appropriate procedure for attacking void judgment was Rule 1.540(b)); *Shields v. Flinn,* 528 So.2d 967, 968 (Fla. 3d DCA 1988) (relief from void judgment may be granted at any time). Emphasis added.

20. Defendant hereby attaches its Answers and Affirmative Defenses to the Amended Complaint and requests that it stand as the Defendant's responsive pleading. See Exhibit "C".

WHEREFORE, the Defendant respectfully requests that this Honorable Court grant the following relief:

A. Set aside the Default entered against the Defendant;

B. Vacate the Final Default Judgment entered against the Defendant;

C. Set aside the Order on Plaintiff's *Ore Tenus* Motion for Attorney's Fees and Costs;

D. Set aside the Writ of Execution entered on June 6, 2017;

E. Compel the parties to cooperate in the appraisal process;

F. Stay all collection activities of the Plaintiff;

G. Order that the Answer and Affirmative Defenses attached hereto stand as the Defendant's responsive pleading;

H. Grant any further relief that the Court finds to be just and reasonable under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this document has been served on the 22nd day of August 2017 to the parties identified below (i) through the Florida Courts E-Filing Portal and/or by e-mail pursuant to Fla. R. Jud. Admin. 2.516(b)1, or (ii) by the alternative method specified above the party's name.

David M. Graham, Esq.
Attorney for Plaintiff

Pleadings@davidgrahaminsurancelaw.com

/s/ J. Richard Young, III
J. Richard Young, Esq.
Mozley, Finlayson & Loggins LLP
4767 New Broad Street
Orlando, FL 32814
407.514.2765
FL Bar: 0563250
RYoung@MFLLaw.com

DAVID GRAHAM INSURANCE LAW, P.A.
18420 High Springs Main Street, High Springs, Florida 32643
Office (386) 454-LOSS Fax (904) 758-0584
help@grahamlawpa.com

January 03, 2017

SENT VIA FAX TO: (866)728-7098

TO: Assurant Property and Casualty Insurance Company
260 Interstate N. Circle SE
Atlanta, GA 30374

RE: Our Client/ Your Insured: Jimmy Rushing
Claim Number: 00102101913
Location of Loss: 701 2nd St S,
Jacksonville Beach, FL 32250
Field Adjuster: Joseph Belforti

Greetings:

Our client is invoking the appraisal provision of the policy and naming Jeffery Pellet as their appraiser. He can be contacted directly at JeffreyPellet@gmail.com or (954) 439-5333. Please contact my office should you have any questions or concerns.

Respectfully,

David M. Graham
Attorney at Law

cc: Appraiser via email

jeffreypellet@gmail.com

EXHIBIT

A

DAVID GRAHAM INSURANCE LAW, P.A.
18420 High Springs Main Street, High Springs, Florida 32643
Office (386) 454-LOSS Fax (904) 758-0584
help@grahamlawpa.com

January 03, 2017

SENT VIA FAX TO: (866)728-7098

TO: Assurant Property and Casualty Insurance Company
260 Interstate N. Circle SE
Atlanta, GA 30374

RE: Our Client/ Your Insured: Jimmy Rushing
Claim Number: 00200854496
Location of Loss: 620 1st St S
Jacksonville Beach, FL 32250
Adjuster: Miguel Riva

Greetings:

Our client is invoking the appraisal provision of the policy and naming Jeffery Pellet as their appraiser. He can be contacted directly at JeffreyPellet@gmail.com or (954) 439-5333. Please contact my office should you have any questions or concerns.

Respectfully,

David M. Graham
Attorney at Law

cc: Appraiser via email

jeffreypellet@gmail.com

EXHIBIT

B

IN THE CIRCUIT COURT FOR THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2017-CA-001496

JIMMY RUSHING

Plaintiff,

VS.

AMERICAN SECURITY INSURANCE COMPANY,

Defendant.

_______________________________________/

ANSWER AND AFFIRMATIVE DEFENSES

COMES NOW the Defendant, AMERICAN SECURITY INSURANCE COMPANY, by and through its undersigned counsel and answers the Plaintiff's Amended Complaint as follows:

1. Admitted for jurisdictional purposes only.
2. Admitted.
3. Admitted that the Defendant had a policy of insurance regarding the referenced property. Any inference that the Plaintiff was a named insured, named beneficiary or omnibus insured is denied.
4. Admitted that the Defendant had a policy of insurance regarding the referenced property. The Plaintiff is incorrectly identified as the "Insured". He was not a named insured, named beneficiary or omnibus insured.
5. Admitted.
6. Denied that Defendant has waived any conditions precedent. Denied that Plaintiff has performed all conditions precedent. Specifically, the parties were engaged in the appraisal

EXHIBIT

C

process as set forth in the insurance policy. Plaintiff failed to allow the process to complete prior to filing his Amended Compliant.

7. Denied.
8. Denied.
9. Denied.

AFFIRMATIVE DEFENSES

1. The Plaintiff is not in privity with the Defendant. The relevant insurance policy names the mortgagee or its agent, Nationstar Mortgage, LLC as the Named Insured. The Plaintiff is named as the "Borrower". The Plaintiff is not the "named or omnibus insured or the named beneficiary under" the policy. Therefore, the Plaintiff does not have the ability to recover attorney fees pursuant to Florida Statute 627.428.

2. The Complaint is barred and/or limited by terms, conditions, limitations and exclusions as set forth within the Policy.

3. The Plaintiff is estopped from pursuing the Amended Complaint until such time as the appraisal process is complete.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this document has been served on the 22nd day of August 2017 to the parties identified below (i) through the Florida Courts E-Filing Portal and/or by e-mail pursuant to Fla. R. Jud. Admin. 2.516(b)1, or (ii) by the alternative method specified above the party's name.

David Graham
Pleadings@DavidGrahamInsuranceLaw.com
Attorney for Plaintiff

/s/ J. Richard Young, III
J. Richard Young, Esq.
Mozley, Finlayson & Loggins LLP
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