WELLS FARGO FINANCIAL NATIONAL BANK., a national bank,

Plaintiff,

vs.

FLORIDA SOLAR DISTRIBUTORS, INC., a Florida corporation,

Defendant.
_____/

REPLY TO DEFENDANT=S MOTION TO VACATE DEFAULT

COMES NOW, Plaintiff, Wells Fargo Financial National Bank, a national bank, (AWells Fargo@) by and through its undersigned counsel, hereby files its Reply to Defendant=s Motion to Vacate Default pursuant to Rule 1.500 (d) and 1.540(b) of the Florida Rules of Civil Procedure, and in furtherance thereof states as follows:

STATEMENT OF FACTS

1. Florida Solar Distributors, Inc., (AFlorida Solar@) and Wells Fargo entered into an agreement whereby Wells Fargo would provide financing to customers for the purchase of equipment and installation to be completed by Florida Solar customers, tending payment directly to Florida Solar for these products and services

2. On May 23, 2007 Wells Fargo notified Florida Solar of numerous customers who alleged Florida Solar had not completed the services purchased by said customers.

3. To handle the dispute, Florida Solar hired the services of attorney C. Gene Shipley. Mr. Shipley and the undersigned discussed at length the issues throughout the Summer of 2007.

4. When it became apparent that the matter was not going to be resolved, Wells Fargo filed suit on September 4, 2007. Services was perfected against Florida Solar on September 6, 2007.

5. Thereafter, on or about September 25, 2007, attorney C. Gene Shipley contacted the undersigned and requested a seven day extension of time to respond as he just received the Complaint. The undersigned agreed to the extension.

6. On October 3, 2007, the undersigned contacted attorney C. Gene Shipley regarding the response and was again asked for an extension of two more days to respond. The undersigned again agreed, but informed opposing counsel that a Motion for Default would be filed and set for hearing. The Motion for Default was served on October 4, 2007, and was set for hearing on October 15, 2007. See the string of emails attached hereto as Exhibit A1.@.

7. Defendant, Florida Solar, did not respond to the Complaint and a Default was entered against the Defendant by this Court on October 15, 2007. A Motion for Default Final Judgment was filed on November 14, 2007, and set for hearing on December 4, 2007.

8. Thereafter, Florida Solar, apparently re-retained counsel to represent it in this case and on November 30, 2007, filed its Motion to Vacate Default.

MEMORANDUM OF LAW

According to Rules 1.500(d) and 1.540(b) of the Florida Rules of Civil Procedure relief from default and default final judgement may be granted as a result of mistake, inadvertence, surprise,

excusable neglect, newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing, fraud, misrepresentation, mis conduct of an adverse party, satisfaction, release, reversed vacated or void judgement, or that the judgement is no longer equitable.

In order to be successful to set aside a clerk=s default a party must show that: 1) the failure to file a responsive pleading was the result of excusable neglect 2) the party has a meritorious defense, and 3) the party has been reasonably diligent in seeking to vacate the default after it was discovered. Johnson v. Johnson, 845 So.2d 217 (Fla. 2nd DCA 2003); Hunt Exterminating Co., Inc v. Crum, 598 So.2d 113 (Fla. 2nd DCA 1992); Ponderosa, Inc. v. Stephens, 549 So.2d 1162 (Fla. 2nd DCA 1989); Bland v. Viking Fire Protection Inc., 454 So.2d 763 (Fla 2nd DCA 1984). Failure of defendant to satisfy any one of these elements must result in a denial of motion to set aside default judgement.

Plaintiff, Wells Fargo, filed a complaint on September 4, 2007 against Florida Solar for the alleged amounts due. Defendant had counsel at that time, who asked for and received extensions of time to respond. However, no response was made and a default was entered. Defendant asserts that it was financially unable to keep counsel and asserts that as its inability to respond within the 20 day period as the basis for excusable neglect.

This assertion is without merit because a defendant=s failure to retain or keep counsel is not excusable neglect entitling the party relief from the default. Goldome v. Davis, 567 S0.2d 909, (Fla. 2d DCA 1990). In Goldome at 910 the court stated:

> A defendant=s failure to understand the legal consequences of his inaction is not excusable neglect. *See Kapetanopoulos v. Herbert*, 449 So.2d 947, 949 (Fla. 2d DCA 1984); *Claffey*, 338 So.2d at 271. The fourth district has succinctly stated the law on this matter in the following way:
> The failure of a party to make the required steps necessary to protect its own interests, cannot, standing alone, be grounds to vacate judicially authorized acts to the detriment of other innocent parties. The law requires certain diligence of those subject to it, and this diligence cannot be lightly excused . . . John Crescent, Inc. v. Schwartz, 382 So.2d 383, 385-386 (Fla. 4th DCA).

See also, Holland Electronics, LLC v. Vital Systems Electronics, Inc., 942 So.2d 1047 (Fla. 2nd DCA 2006) where the court, in part, found that financial inability to retain counsel is not sufficient to support excusable neglect. Defendant had counsel at the commencement of the lawsuit but apparently could not afford counsel. This, however, does not amount to excusable neglect to set aside a default. Defendant must have known that a default would be entered by his inaction, unlike the Goldone case.

In addition to the foregoing showing Defendant=s failure to establish excusable neglect, Defendant further failed to move with due diligence to set aside the default entered. In this case, the default was entered on October 15, 2007. More than six weeks and almost seven weeks elapsed before the Defendant, through the same attorney, filed the Motion to Set Aside Default.

The 4th DCA in Westinghouse Credit Corporation v. Steven Lake Masonry, Inc., 356 So.2d 1329 (Fla. 4th DCA 1978) stated at 1130:

> Moreover, swift action must be taken upon first receiving knowledge of any default. Further delay in excess of the time reasonably necessary to prepare and file a notice to vacate should prove fatal, absent some exceptional circumstance.

In Westinghouse, the court refused to set aside a default after a seven week delay before moving to set aside the default. The 4th DCA in Hepburn v. All American General Construction Corp., 954 So.2d 1250 (Fla. 4th DCA 2007) held at 1252 that:

> Absent competent substantial evidence of some exceptional circumstances explaining the delay, a six week delay in filing a motion to vacate a default judgment after receiving notice constitutes a lack of due diligence as a matter of law.

The 3rd DCA in Bayview Tower Condominium Association, Inc. v. Schwartz, 475 So.2d 985 (Fla. 3rd DCA 1985) found a lack of due diligence after a four week delay in moving to set aside a default. Finally, in Schwartz v. Business Cards Tomorrow, Inc., 644 So.2d 611 (Fla. 4th DCA 1994), the court held that where plaintiff engaged in extraordinary efforts to notify defendant that the lawsuit was going forward, and attempted to induce some response to litigation by defendant or his counsel, a default was properly upheld. Such is the case here where Plaintiff=s counsel was in constant communication with defense counsel to respond to the Complaint, provided a Notice of Hearing on the Motion for Default; default having been entered and Defendant waiting close to seven weeks before attempting to vacate the default. This Court should not set aside the default judgment because the defendant was not able to show exceptional circumstances of delay. Defendant has failed to establish two of the three prongs to set aside the default and as such, Defendant=s Motion to Set Aside Default should be denied.

WHEREFORE, Plaintiff, Wells Fargo, prays that this honorable Court enter an Order denying Defendant=s Motion to Set Aside Default and for such other and further relief for

which Plaintiff may show itself justly entitled.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ____ day of _____, 2009 to C. Gene Shipley, Esquire, Nardella Chong, 234 North Westmonte Drive, Suite 3000, Altamonte Springs, Florida 32714-3373.