



## Orange Beacon Marketing, LLC v. Outstanding Real Estate Solutions, Inc. et al

2023 | Cited 0 times | W.D. Texas | October 2, 2023

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

SAN ANTONIO DIVISION

ORANGE BEACON MARKETING, LLC, Plaintiff, vs. OUTSTANDING REAL ESTATE SOLUTIONS, INC., FWE, LLC, Defendants.

§ § § § § § § § § §

SA-22-CV-00570-FB

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE To the Honorable United States District Judge Fred Biery: This Report and Rec Default Final Judgment as to Damages [#20]. All pretrial matters in this case have been referred to the undersigned for disposition pursuant to Western District of Texas Local Rule CV-72 and Appendix C [#10]. The undersigned therefore has authority to enter this recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that e granted in part and a final default judgment be entered against Defendants.

I. Jurisdiction and Venue 1332(a) because this case involves a controversy exceeding the sum or value of \$75,000, and

there is complete diversity of citizenship among the parties. Plaintiff Orange Beacon Marketing, LLC, is a limited liability company with a sole member, Tengjun Wang, who is a Citizen of California. (Compl. [#1], at ¶ 1.) Defendant Outstanding Real Estate Solutions, Inc., is a corporation incorporated in the State of Texas with a principal place of business also in Texas. (Id. at ¶ 2.) Defendant FWE, LLC, is a limited liability corporation with two members, William Nakulski and Filoniki Goulas, both of whom are citizens of Illinois. (Id. at ¶ 3.) Therefore, Outstanding Real Estate Solutions, Inc., is a citizen of Texas, and FWE, LLC, is a citizen of Illinois for purposes of diversity jurisdiction. See MidCap Media Fin., L.L.C. v. Pathway Data, Inc., 929 F.3d 310, 313 14 (5th Cir. 2019) (citizenship of corporation is determined by its state of incorporation and principal place of business); Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077, 1080 (5th Cir. 2008) (citizenship of LLC is determined by citizenship of its members). Venue is proper in this Court because a substantial part of the acts or omissions giving See 28 U.S.C. § 391(b)(2). Plaintiff alleges that the Promissory Note underlying this suit was executed in Comal County, Texas, and the terms of the Note state it shall be



## Orange Beacon Marketing, LLC v. Outstanding Real Estate Solutions, Inc. et al

2023 | Cited 0 times | W.D. Texas | October 2, 2023

governed by and construed in accordance with the laws of the State of Texas. (Compl. [#1], at ¶ 5.)

II. Background Plaintiff Orange Beacon Marketing, LLC, filed this action on June 1, 2022, against Defendants Outstanding Real Estate Solutions, Inc., and FWE, LLC. The Original Complaint is ts executed a promissory note to repay a loan from Plaintiff in the amount of \$300,000, under which Defendants were to make monthly payments on the note until July 3, 2021, when the note was to mature. According to the Complaint, Defendants are in default on their note payments, and Plaintiff seeks the full amount payable under the Note, together with interest, late charges, and all costs of collection. (Compl. [#1], at 1 5.) Attached to the Complaint is a copy of the Promissory Note underlying the suit. (Note [#1-2], at 1 8.) Plaintiff requested issuance of summons at the time of the filing of the Complaint, but service was not completed within the time period prescribed by Rule 4(m) of the Federal Rules of Civil Procedure. The Court therefore ordered Plaintiff to show cause why this case should not be dismissed for want of prosecution. In response, Plaintiff filed a return of summons, reflecting that Defendant Outstanding Real Estate Solutions, Inc., had been served with process on August 11, 2022, making its answer or responsive pleading due on September 1, 2022. Plaintiff also

entered on October 21, 2022. Plaintiff filed a motion for substitute service as to Defendant FWE, LLC, due to difficulties effectuating personal service on this Defendant. The District Court thereafter referred the case to the undersigned for pretrial proceedings. ice on November 9, 2022, attorney, by social media and email, or by any other technology that would give FWE reasonable

notice of this lawsuit. Plaintiff thereaf which Plaintiff attached certified mail receipts, reflecting Plaintiff mailed a copy of the

correspondence transmitting the same on November 9, 2022. The Clerk entered default on

December 2, 2022, as to FWE. Plaintiff took no further action in this case for several months, until, on February 6, 2023, the Court ordered Plaintiff to show cause why this case should not be dismissed for want of response, Plaintiff filed motion for summary judgment undersigned construed as a

motion for default judgment. In that motion, Plaintiff argued it is entitled to judgment against Defendants for the unpaid principal balance of the Note, plus interest, fees, costs, and other charges. The undersigned issued a report and recommendation, recommending the motion be granted but final judgment be withheld until after the undersigned issued an additional report and r ordered that Plaintiff file a motion for default judgment on damages supported by an amended affidavit report and recommendation [#19], and Plaintiff filed the motion for default judgment and

amended affidavit as ordered.

III. Legal Standard When a party against whom a judgment for affirmative relief is sought has failed



## Orange Beacon Marketing, LLC v. Outstanding Real Estate Solutions, Inc. et al

2023 | Cited 0 times | W.D. Texas | October 2, 2023

to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must

enter a default judgment against the defaulting defendant upon motion by the plaintiff. See Fed. R. Civ. P. 55(b); Brown, 84 F.3d at 141. In considering a motion for default judgment, the court accepts as true the well-pleaded allegations of facts in the complaint (except regarding damages) but must determine whether those facts state a claim upon which relief may be granted. See Matter of Dierschke, 975 F.2d 181, 185 (5th Cir. 1992) (stating that a defaulting party is deemed to have admitted all well-pleaded allegations of the complaint); United States ex rel. M-Co. Constr., Inc. v. Shipco Gen., Inc., 814 F.2d 1011, 1014 (5th Cir. 1987). Thus, for a plaintiff to entered Nishimatsu Constr. Co., Ltd. v. Houston Nat l Bank, 515 F.2d 1200, 1206 (5th Cir.

1975); see Lewis v. Lynn (quoting Ganther v. Ingle, 75 F.3d 207, 212 (5th Cir. 1996)).

IV. Analysis The record in this case establishes that Defendants failed to plead or otherwise defend default against both Defendants. The undersigned further finds that Plaintiff is entitled to default

upon which relief can be granted, and these facts are deemed as admitted by Defendants.

g. On or about May 3, 2021, Defendants executed and delivered to Plaintiff a Promissory Note for the purpose of securing repayment of a loan by Plaintiff to Defendants in the amount of \$300,000. (Compl. [#1], at ¶ 6.) Because the Complaint references the Promissory Note and attaches it to the pleadings, the Promissory Note is incorporated by reference into the pleadings. See Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir. 2010).

The Promissory Note designates Outstanding Real Estate Solutions, Inc., and FWE, LLC, as Debtors, who promise to pay Plaintiff, the Holder of the Note, \$300,000 plus interest on or before the maturity date of July 3, 2021. (Promissory Note [#1-2], at 1.) Upon maturity, the entire unpaid principal balance of the Note is payable. (Id.) The Note bears a flat interest amount of \$200,000 over the term of the Note, which is also due and payable in full on the Maturity Date, making the grand total amount due as \$500,000. (Id.) Upon default, the unpaid principal and accrued interest balance of the Note will immediately and without notice bear a flat interest amount of \$500 per day on the first day following the due date of monthly interest and/or the maturity date of the Note. (Id.) The Note also states that the Debtors shall pay or reimburse Plaintiff for all costs and expenses associated with collection of the debt, including attorneys fees. (Id.) The President of Outstanding Real Estate Solutions, Inc., Chimene Van Gundy, and the Manager of FWE, LLC, William Nakulski, signed the Promissory Note on behalf of Defendants. (Id. at 4.)

since the maturity date of July 3, 2021, and Defendants are in default. (Compl. [#1], at ¶ 8.)

Plaintiff seeks \$300,000 in Principal on the Note, together with interest, late charges, and all costs of collection, including but not limited to reasonable attorneys fees. (Id. at ¶ 15.)



## Orange Beacon Marketing, LLC v. Outstanding Real Estate Solutions, Inc. et al

2023 | Cited 0 times | W.D. Texas | October 2, 2023

To recover on a promissory note under Texas law, the plaintiff must prove: (1) the existence of the note in question, (2) the party sued signed the note, (3) the plaintiff is the owner or holder of the note, and (4) a certain balance is due and owing on the note. *Bean v. Bluebonnet Sav. Bank*, FSB, 884 S.W.2d 520, 522 (Tex. App. Dallas 1994, no writ). Accordingly, based on the well-undersigned finds that Plaintiff has established that it is the holder of the Promissory Note at

issue; that Defendants signed the Promissory Note; and that Defendants are in default. By failing default judgment. See *Matter of Dierschke*, 975 F.2d at 185.

However, establishing the entitlement to a default judgment does not necessarily prove the amount of damages due. Rule 55(b) provides a court with discretion to convene an evidentiary hearing on the issue of damages. Fed. R. Civ. P. 55(b)(2). When a party seeks default judgment, damages ordinarily may not be awarded without a hearing or a demonstration by detailed affidavits establishing the necessary facts. *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979). However, where the amount of damages can be determined with certainty by reference to the pleadings and supporting documents, and where a hearing would reveal no pertinent information, the court need not jump through the hoop of an evidentiary hearing. *James v. Frame*, 6 F.3d 307, 310 11 (5th Cir. 1993) (a district court has wide latitude in deciding whether to require an evidentiary hearing when granting default judgment). is the amended affidavit of Tengjun 20-2], at 1 4.) The affidavit states that Plaintiff maintains records for the loan at issue and that these records reflect that Defendants have not made any payments on the Note and owe the following amounts:

Principal Balance \$300,000 Interest Owed from July 3, 2021, to May 31, 2023

\$200,000 Unpaid Default Interest to May 31, 2023

\$349,000 Attorneys Fees and Costs Incurred in Prior Actions Against Borrower Related to the Loan

\$32,382.12

TOTAL \$881,382.12

\$300,000 in principal; \$200,000 in interest owed from July 3, 2021, to February 3, 2023;

\$290,500 in unpaid default interest; \$49,074.63 in unpaid charges; \$5,000 as a default fee; and \$235 in processing fees. (See Report and Recommendation [#18], at 7.) affidavit did not adequately explain to the Court how Plaintiff calculated these figures,

Mr. Wong has removed the undefined line items from the damages model contained in his amended affidavit. However, Plaintiff has added a request for attorneys fees incurred in prior actions related to the loan. 1



## Orange Beacon Marketing, LLC v. Outstanding Real Estate Solutions, Inc. et al

2023 | Cited 0 times | W.D. Texas | October 2, 2023

Plaintiff does not include any information or supporting documentation regarding the incurred attorneys fees. The District Court should therefore issue a final default judgment awarding Plaintiff its costs 2

as well as damages consisting of \$300,000 in principal, \$200,000 in flat interest, and \$349,000 in default interest (representing 698 days of interest at a rate of \$500 per day), but deny the motion as to attorneys fees. As previously noted, Plaintiff may file a separate motion for attorneys fees pursuant to Local Rule 54 with supporting documentation regarding fees incurred. If Plaintiff believes it is entitled to attorneys fees related to prior attempts to enforce the note outside of this lawsuit, Plaintiff may present argument and documentation to the Court regarding such fees.

### V. Conclusion and Recommendation

Default Judgment as to Damages [#20] be GRANTED in part as set forth herein. Plaintiff is entitled to a final default judgment comprised of \$300,000 in principal, \$200,000 in flat interest, and \$349,000 in default interest through May 31, 2023, for a total judgment of \$849,000. Plaintiff should file objections if he is seeking additional default interest

motion should be DENIED without prejudice to Plaintiff filing a Bill of Costs and Motion for accordance with Local Rule 54.

1 The undersigned previously ordered Plaintiff to file a separate motion for attorneys in the prior report and recommendation.

2 Plaintiff should file a Bill of Costs in accordance with Local Rule 54.

VI. Instructions for Service and Notice of Right to Object/Appeal The United States District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as mail, return receipt requested. Written objections to this report and recommendation must be

filed within fourteen (14) days after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The party shall file the objections with the Clerk of Court and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous proposed findings, conclusions and recommendations contained in this report shall bar the party

from a de novo determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149 52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this report and



## Orange Beacon Marketing, LLC v. Outstanding Real Estate Solutions, Inc. et al

2023 | Cited 0 times | W.D. Texas | October 2, 2023

recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the un-objected-to proposed factual findings and legal conclusions accepted by the district court. , 79 F.3d 1415, 1428 29 (5th Cir. 1996) (en banc). SIGNED this 2nd day of October, 2023.

ELIZABETH S. ("BETSY") CHESTNEY UNITED STATES MAGISTRATE JUDGE

