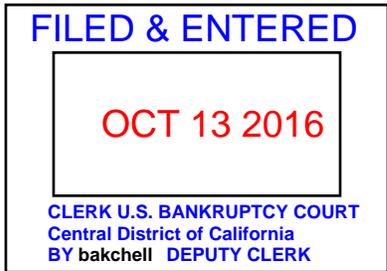


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ORDER NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

BRIAN J. COOK and VICTORIA
VELASQUEZ COOK,

Debtor.

HEIDE KURTZ, solely in her capacity
as the Chapter 7 Trustee for the
Bankruptcy Estate of Brian J. Cook
and Victoria Velasquez Cook,

Plaintiff,

vs.

CENTURY WEST FINANCIAL CORP.,
a California corporation,

Defendant.

Case No. 2:15-bk-10768-RK

Chapter 7

Adv. No. 2:16-ap-01318-RK

**MEMORANDUM DECISION AND
ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR DEFAULT JUDGMENT**

Pending before the court in the above-captioned adversary proceeding is the motion of plaintiff Heide Kurtz, Chapter 7 Trustee in this bankruptcy case ("Plaintiff"), for default judgment on her first, fourth and seventh causes of action against Defendant Century West Financial Corp. ("Defendant"). Electronic Case Filing No. (ECF or Docket No.) 13. Kyra E. Andrassy, of the law firm of Smiley Wang-Ekval, LLP, represents Plaintiff. Defendant, whose default has been entered by the Clerk of Court in this

1 adversary proceeding, ECF 10, did not file any response to the motion for default
2 judgment.

3 On July 19, 2016, Plaintiff commenced this adversary proceeding by filing a
4 complaint that, among other things, asserted the following causes of action: the first
5 cause of action for declaratory relief against Defendant to determine that the Evergreen
6 lien is void, the fourth cause of action for declaratory relief against Defendant that the
7 Defendant lien is void, and the seventh cause of action for fraud . ECF 1. Defendant did
8 not serve or file any response to the complaint by the deadline of August 19, 2016 as set
9 forth in the summons service filed with the court and Plaintiff's request for entry of default
10 and declaration in support thereof. ECF 7, 8 and 9. On August 22, 2016, Plaintiff filed a
11 request for the Clerk of Court to enter default under Local Bankruptcy Rule 7055-1(a),
12 ECF 8, and default was duly entered against Defendant, ECF 10. On September 29,
13 2016, Plaintiff filed the instant motion for default judgment, and served copies of the
14 moving papers on defendant by mail. ECF 13.

15 Having read and considered Plaintiff's motion for default judgment and the record
16 otherwise before the court, the court rules as follows:

- 17 1. As to Plaintiff's first cause of action for declaratory relief against Defendant to
18 determine that the Evergreen lien is void, Plaintiff's fourth cause of action for
19 declaratory relief against Defendant Century West Financial Corp. that the
20 Century West Financial Corp. lien is void, and Plaintiff's seventh cause of
21 action for fraud, the court determines that the motion for default judgment
22 should be and is granted for the reasons stated in the moving papers.
- 23 2. Regarding Plaintiff's request for compensatory damages through the seventh
24 cause of action, Motion for Default Judgment at 8-9, the court may award
25 compensatory damages against defendant in an action incurred as a result of a
26 fraudulently obtained title document, including the cost of the legal proceedings
27 necessary to remove the cloud on title, under state law. *Forte v. Nolfi*, 25
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1 Cal.App. 3d 656, 686 (1972)(citations omitted). However, due to procedural
2 due process concerns, the court grants Plaintiff's request in part and denies it
3 in part. Specifically, the court determines that the request in part contravenes
4 Federal Rule of Civil Procedure 54(c) ("FRCP"), made applicable to this
5 adversary proceeding by Federal Rule of Bankruptcy Procedure 7054, stating,
6 "A default judgment must not differ in kind from, or exceed in amount, what is
7 demanded in the pleadings." "This assures the 'fundamental fairness' required
8 by due process of law. Defendant may have decided to allow a default
9 judgment to be taken based on the relief prayed for in the complaint. It would
10 be unfair to allow plaintiff to obtain different relief." Wagstaffe, *Rutter Group*
11 *Practice Guide: Federal Civil Procedure Before Trial (National Edition)*, ¶ 6:131
12 at 6-36 (online ed. March 2016 update), *citing*, *Fehlhaber v. Fehlhaber*, 681
13 F.2d 1015, 1024-1025 (5th Cir. 1982). Plaintiff in the prayer for relief in her
14 complaint did not pray for a specific amount of damages, but sought an award
15 of "attorney's fees and costs as provided by law, " "costs of suit" and "[s]uch
16 other and further relief as the Court may deem just and proper." ECF 1 at 12.
17 Under Federal Rule of Civil Procedure 8(a)(3), the complaint must allege a
18 "demand for the relief sought" See, Wagstaffe, *Rutter Group Practice*
19 *Guide: Federal Civil Procedure Before Trial (National Edition)*, ¶ 6:132 at 6-37.
20 "But such general allegations of damages will *not* support a default judgment
21 for a greater, unlimited amount. 'Fundamental fairness' limits plaintiff to the
22 greatest amount specifically alleged in the complaint." *Id.* (emphasis in
23 original), *citing*, *Fehlhaber v. Fehlhaber*, 681 F.2d at 1025. Since Plaintiff did
24 not specify any amount of attorneys' fees as compensatory damages, the
25 general rule would not allow any fees as damages. However, there may be an
26 exception to the general rule applicable here to allow a partial amount of
27 attorneys' fees. "While FRCP 54(c) limits damages to the amount pleaded in
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1 the complaint, the rule is not violated when a court awards damages on a
2 default hearing that accrued during pendency of the action if the complaint put
3 defendant on notice that plaintiff might seek such damages.” *Wagstaffe, Rutter*
4 *Group Practice Guide: Federal Civil Procedure Before Trial (National Edition)*,
5 ¶ 6:131.1 at 6-36, *citing, Boland v. Yoccabel Construction Co.*, 293 F.R.D. 13,
6 18-19 (D. D.C. 2013). This limited exception appears to apply since Plaintiff in
7 the prayer for relief in her complaint in this adversary proceeding requested an
8 award of attorneys’ fees and costs, which arguably could apply to such fees
9 and costs incurred during the pendency of this adversary proceeding and it
10 would not be “fundamentally unfair” to award such fees and costs on this
11 complaint. Thus, under this limited exception, the court may award
12 compensatory damages for the attorneys’ fees that Plaintiff incurred during the
13 pendency of this action, which is based on the counsel declaration in support of
14 the motion to be the amount of \$12,263.50, as well as the costs of \$150.00 for
15 filing the complaint in this adversary proceeding. However, the other claimed
16 attorneys’ fees and costs were not incurred during the pendency of this
17 adversary proceeding, but were incurred before the adversary proceeding and
18 were thus known to Plaintiff and the amounts incurred could have been alleged
19 in the complaint under Federal Rule of Civil Procedure 8(a)(3). The other
20 attorneys’ fees and costs were incurred by the debtors Brian J. Cook and
21 Victoria Velasquez Cook (“Debtors”) for the services of their attorney in the
22 state court action that Chase brought against them, which raised the issue of
23 defendant’s fraudulent trust deed. Since these fees and costs were incurred
24 before this adversary proceeding was commenced, the court determines that
25 Plaintiff should not be awarded compensatory damages for the fees and costs
26 Debtors’ counsel incurred, \$21,104.00 and \$519.71, respectively, and the
27 attorneys’ fees that Plaintiff incurred for the services of her attorneys in that
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1 action, \$17,808.00, because such fees and costs were not incurred during the
2 pendency of this adversary proceeding and there is insufficient notice to
3 Defendant that such damages are being alleged in the complaint. The prayer
4 for relief in Plaintiff's complaint requests "attorney's fees and costs as provided
5 by law", Complaint, ECF 1 at 12, and does not specifically request the fees and
6 costs that Debtor's counsel incurred, \$21,104.00 and \$519.71, respectively,
7 and the fees Plaintiff incurred, \$17,808.00, related to the Chase action, which
8 amounts were apparently known to Plaintiff at the time that she filed the
9 complaint in this adversary proceeding. Accordingly, while the court allows
10 Plaintiff's request for \$12,263.50 in fees and \$150.00 in costs incurred during
11 the pendency of this adversary proceeding, the court denies Plaintiff's request
12 for the fees and costs Debtor's counsel incurred, \$21,104.00 and \$519.71,
13 respectively, and the fees Plaintiff incurred, \$17,808.00, related to the Chase
14 Action.

- 15 3. Plaintiff could possibly file and serve an amended complaint to seek the
16 attorneys' fees and costs not allowed by this order if sufficient notice of the
17 demand for such fees and costs is given to Defendant in an amended
18 complaint. See, 10 Wright, Miller, Kane, et al., *Federal Practice & Procedure*, §
19 2663 (3rd ed. online ed. April 2016 update)(allowing amendment "may present
20 the better course" of action where damages are underpled). If Plaintiff elects
21 not to file and serve an amended complaint to seek an award of the disallowed
22 attorneys' fees and costs, then Plaintiff must lodge a judgment consistent with
23 this order within 30 days of the date of entry of this order.

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4. The remaining claims for relief, the second cause of action to avoid and preserve the Evergreen lien as a fraudulent transfer pursuant to 11 U.S.C. §§ 544(b) and 550 and California Civil Code § 3439.04(a)(2), the third cause of action to avoid and recover fraudulent transfer of the Evergreen lien pursuant to 11 U.S.C. §§ 544(b) and 550 and California Civil Code § 3439.05, the fifth cause of action to avoid and preserve the Century West lien as a fraudulent transfer pursuant to 11 U.S.C. §§ 544(b) and 550 and California Civil Code § 3439.04(a)(2), and the sixth claim for relief to avoid and preserve the Century West lien as a fraudulent transfer pursuant to 11 U.S.C. §§ 544(b) and 550 and California Civil Code § 3439.05, are dismissed without prejudice at Plaintiff's request based on the court's granting of this motion.

IT IS SO ORDERED.

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Date: October 13, 2016



Robert Kwan
United States Bankruptcy Judge