

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL
CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

GREEN BULLION FINANCIAL SERVICES,
LLC, a Florida limited liability company,

CASE NO.: 09-014536

Plaintiff,

v.

MICHELLE M. LIBERIS, an individual,

Defendant.

**DEFENDANT MICHELLE LIBERIS' AMENDED MOTION
TO VACATE AND SET ASIDE DEFAULT**

Defendant Michelle Liberis files this amended motion to vacate and set aside the default entered April 14, 2009 and states as follows:

I. FACTUAL BACKGROUND

1. Plaintiff filed its Complaint on or about March 12, 2009, purporting to assert a cause of action for defamation. In summary, Plaintiff seeks judgment for damages based on the following allegations:

a. Plaintiff is in the business of buying gold and jewelry from customers through an internet website known as Cash4Gold;

b. Until late October 2008, Defendant Liberis worked for Plaintiff as a customer service representative;

c. In October 2008, Plaintiff terminated Defendant for work-related deficiencies;

d. After her termination, Defendant allegedly published certain statements on the internet about Plaintiff's business practices which were false and deceptive, defamatory and

libelous; and

e. Plaintiff sustained pecuniary loss and injury to reputation as a result of

Defendant's actions;

2. On March 14, 2009, Plaintiff filed and served the Complaint together with initial interrogatories.

3. On April 2, 2009, Defendant Liberis filed answers to interrogatories with the Clerk (Answers to Interrogatories, Exhibit A, attached; Declaration Under Penalty of Perjury by Michelle Liberis, Exhibit B, attached).

4. On the mistaken belief that the interrogatory answers also acted as her reply to the Complaint, Defendant Liberis did not file a separate responsive pleading to the Complaint (Declaration Under Penalty of Perjury by Michelle Liberis, Exhibit B, attached).

5. On April 14, 2009, Plaintiff filed and obtained entry of a Clerk's Default without notice to Defendant.

6. Plaintiff's counsel indicates the interrogatory answers were never received and Defendant is unable to certify service.

II. MEMORANDUM OF LAW

(A).The Clerk's Default Was Improper And Should Be Deemed Void

As an initial matter, the Clerk's Default should never have been entered. The interrogatory answers filed April 2, 2009 set forth unequivocal and explicit denials of the allegations in the Complaint and, consequently, Defendant Liberis was entitled to receive

sufficient notice of the application for default filed April 14, 2009. The Clerk erred in entering Default.

Analysis of an application for default involves review of Rules 1.500(b) and 1.100, Florida Rules of Civil Procedure.

Florida Rule of Civil Procedure 1.500(b) provides:

When a party against whom affirmative relief is sought has failed to plead or otherwise defend as provided by these rules or any applicable statute or any order of court, the court may enter a default against such party; **provided that if such party has filed or served any paper in the action, the party shall be served with notice of application for default** (emphasis added).

Rule 1.100 provides:

An application to the court for an order shall be by motion which shall be made in writing unless made during a hearing or trial, **shall state with particularity the grounds therefore**, and shall set forth the relief or order sought (emphasis added).

In its application for Clerk's Default, Plaintiff incorrectly states that Liberis failed "to serve or file any papers in this action..." In fact, Defendant had filed answers to interrogatories nearly two weeks prior to the application for default. As a result of Plaintiff's failure to provide sufficient notice of the application for default, it is unnecessary for Defendant Liberis to prove excusable neglect, meritorious defense, and due diligence. *McClenon v. Zartemi*, 710 So.2d 737 (Fla. 3d DCA 1998).

As set forth in *Gulf Maintenance & Supply, Inc., v. Barnett Bank*: "The default rule has been liberally construed in Florida to allow trial upon the merits where all parties appear rather than to encourage resolution of disputes by default." 543 So.2d 813, 816 (Fla. 1st DCA 1989).

(B). The Complaint Fails To State A Cause Of Action

It is well-settled that a default admits only the well pleaded allegations concerning the issue of liability. If the pleading is insufficient to state a cause of action then it cannot be said that a default operates as an admission of liability and it is not necessary for the moving party to show excusable neglect or due diligence in seeking relief from default. *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So.2d 490 (Fla. 3d DCA 1994); *Becerra v. Equity Imports, Inc.*, 551 So.2d 486 (Fla. 3d DCA 1989).

Here, the Complaint asserts a single claim for damages based on “defamation” in a naked attempt to censor speech in violation of the Florida constitutional guarantee of free speech. Plaintiff’s actions after default illustrate the defective nature of the suit when, without notice to Defendant, Plaintiff amended the Complaint to seek injunctive relief on the paradoxical claims that the alleged statements were both defamatory (by definition *false*) and trade secrets (by definition *true*).

In addition to its failure to state a cause of action, the Complaint improperly asserts multiple factual and legal claims by the generally admonished pleading practice of re-alleging and re-adopting allegations. The Complaint contains a single claim for relief and 26 numbered paragraphs. Section III of the Complaint (“Defamation”), however, begins by incorporating and re-alleging all of the preceding allegations, including those found in paragraphs 1 through 21

Michelle Liberis
Defendant Motion to Vacate
and Set Aside Default
Case No.: 09-014536
Page (5)

contained in Section I and Section II of the Complaint.

The re-adopted, re-alleged and incorporated by reference paragraphs of Plaintiff's Complaint is the type of pleading practice that has been admonished and disfavored because of the resulting difficulty for courts to distinguish between a plaintiff's claims and for defendants to frame responsive pleadings. *Gerentine v. Coastal Security Systems*, 529 So. 2d 1191 (Fla. 5th DCA 1988); *Frugoli v. Winn Dixie Stoers, Inc.*, 464 So.2d 1292 (Fla. 1st DCA 1985).

Given the clearly defective nature of the Complaint and Plaintiff's failure to properly state a cause of action, Defendant Liberis should not have been expected to frame a response and, consequently, no default should have been entered.

CONCLUSION

Fore the foregoing reasons, the Clerk's Default entered April 14, 2009 should be deemed void, vacated and set aside and the attached Answer and Affirmative Defenses should be deemed filed.

WHEREFORE, Defendant Michelle Liberis respectfully requests this Court enter an Order vacating and setting aside the Clerk's Default together with such other relief as the court deems appropriate.

Michelle Liberis
Defendant Motion to Vacate
and Set Aside Default
Case No.: 09-014536
Page (6)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of September 2009 to: James P. Gitkin, Esquire and Stephanie Pidermann, Esquire, Saltpeter Gitkin, LLP, Museum Plaza-Suite 503, 200 S. Andrews Avenue, Ft. Lauderdale, Florida 33301.

Respectfully submitted,

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