

LF USA, Inc. v Eurostyle Group, Ltd.

2014 NY Slip Op 30306(U)

January 22, 2014

Sup Ct, New York County

Docket Number: 650671/2013

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

LF USA, INC.,

Plaintiff,

-against-

THE EUROSTYLE GROUP, LTD.,

Defendant.

INDEX NO. 650671/2013

MOTION DATE Nov. 15, 2013

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for a default judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

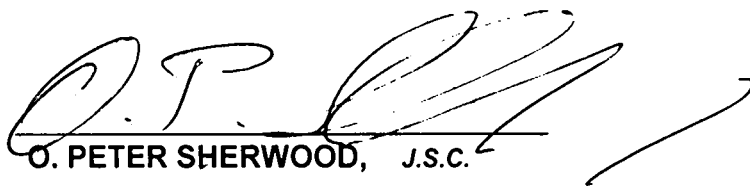
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for a default judgment is decided in accordance with the accompanying decision and order.

Dated: January 22, 2014


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

-----X
LF USA, INC,

Plaintiff,

DECISION AND ORDER

-against-

**Index No. 650671/2013
Mot. Seq. No. 001**

THE EUROSTYLE GROUP, LTD.,

Defendant.

-----X
O. PETER SHERWOOD, J.:

This action arises from a License Agreement dated April 29, 2009. Before the court is plaintiff LF USA, INC's ("LF") motion for an order pursuant to CPLR 3215 granting a default judgment in its favor against defendant The Eurostyle Group, Ltd. ("Eurostyle") upon the summons with notice, alleging damages for breach of contract in the amount of at least \$700,000 and seeking declaratory judgment that LF has no liability for to Eurostyle for any claims under the License Agreement or otherwise, based upon the defendants' failure to timely appear or answer. The motion is unopposed. For the reasons that follow, the motion is granted in part and denied in part.

On or about April 29, 2009, Beyond Productions, LLC and Eurostyle entered into a License Agreement. On January 12, 2011, pursuant to an Asset Purchase Agreement, LF acquired the rights and obligations under the License Agreement. Pursuant to the Licence Agreement, Eurostyle was granted a license certain products and was obligated to make royalty payments, with minimum royalty payments specified for each contract year. Eurostyle has failed to make the required royalty payments, despite due demand. The License Agreement specified that unpaid royalties would accrue interest at a rate of 1.25% per month.

On February 27, 2013, LF commenced the instant action against Eurostyle by the filing of a Summons with Notice. On February 28, 2013 LF served Eurostyle by International Registered Mail, Return Receipt Requested pursuant to Paragraph 21.10 of the License Agreement. On April 1, 2013, LF electronically filed an Affirmation of Service. When the envelope containing the Summons with Notice was returned unopened, notwithstanding being addressed in accordance with

the License Agreement, LF sent a letter to Anna Stylianopoulou, the designated representative of Eurostyle. The letter included a copy of the summons with notice. On April 24, 2013, Ms. Stylianopoulou responded via e-mail, demonstrating actual notice of this action. Eurostyle has not answered or otherwise responded to the summons with notice.

On October 1, 2013, plaintiff moved for a default judgment. LF submits a Certificate of Service, evidencing service of the motion via International Certified Mail Return Receipt Requested, postage pre-paid as well as via email. Eurostyle has not responded to the motion and indeed has not appeared in this action.

In support of its motion for a default judgment, LF submits an affidavit of Pat Pontoriero, a Finance Analyst, attesting to the merits. LF also submits an affirmation of its counsel, John J. Hay, Esq., establishing the default.

It is well settled that a party may obtain a default judgment against a Defendant who fails to appear or answer (CPLR 3215 [a]). On an application for a default judgment, the moving party must present proof of service of the summons and complaint, proof of the claim by a person with personal knowledge of the facts and proof of the default (*see* CPLR 3215 [f]; *Woodsen v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]).

The affidavit of service is *prima facie* evidence that defendant was properly served (*see Benjamin v Avis Rent-A-Car Systems*, 208 AD2d 449, 450 [1st Dept 1994]; *see also 425 E. 26th St. Owners Corp. v Beaton*, 50 AD3d 845 [2d Dept 2008]). LF has an submitted affirmation of service dated April 1, 2013. LF also includes the License Agreement, where Eurostyle agreed to accept service via International Certified Mail. LF has also submitted a certification of service dated October 1, 2013, evidencing service of the instant motion. Parties have a well-settled right to contractually consent to personal jurisdiction and waive strict compliance with statutory service requirements (*see Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137 [1st Dept 2010]; *Gilbert v. Burnstine*, 255 NY 348, 355 [1935]). However, the Court must keep in mind the fundamental principle of personal jurisdiction: to provide “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an

opportunity to present their objections.” (*Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314 [1950]; *see also McCann v Scaduto*, 71 NY2d 164 [1987]; *Raschel v Rish*, 69 NY2d 694 [1986]). In the absence of any opposition the Court finds that Plaintiff properly effectuated service upon Defendants pursuant to the License Agreement and that Eurostyle received actual notice of the pendency of the instant action.

Under CPLR 320(a), Defendants were required to answer or otherwise appear in this action within 30 days of service, which Defendants failed to do. Having failed to answer the allegations of the complaint, Defendants are deemed to have admitted “all traversable allegations in the complaint, including the basic allegation of liability” (*Curiale v Andra Ins. Co.*, 88 NY2d 268, 279 [1996]).

Nevertheless, in order to be entitled to a default judgment, Plaintiff must allege enough facts to enable a court to determine whether it has established a prima facie case (*see, Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *Al Fayed v Barak*, 39 AD3d 371, 372 [1st Dept. 2007]; *Dyno v Rose*, 260 AD2d 694 [3d Dept. 1999]). The Court may consider the complaint, affidavits and affirmations submitted by Plaintiff in support of the motion for default in order to determine whether the Plaintiff has a viable cause of action (*see McGee v Dunn*, 75 AD3d 624, 625 [2d Dept 2010]). “Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default” (*Venturella-Ferretti v Ferretti*, 74 AD3d 792 [2d Dept 2010], quoting *Cardo v Board of Mgrs. Jefferson Vil. Condo*, 29 AD3d 930 [2d Dept 2006]).

The affidavit of Pat Pontoriero sufficiently establishes a prima facie case for breach of contract. The affidavit avers that as of August 31, 2013, Eurostyle owed LF \$658,500 in unpaid royalties plus \$216,450 in unpaid interest at 1.25% per month, the rate specified in the License Agreement, for a total of \$874,950. Accordingly, a default judgment will be granted with respect to that cause of action.

LF also seeks a declaratory judgment that LF has “no liability to Eurostyle for any claims under the License Agreement or otherwise.” Pontoriero’s assertion that “[t]o the best of my

knowledge, Eurostyle does not have any valid claim against LF” is insufficient to establish a prima facie case that LF has no liability to Eurostyle. The motion for a default judgment is denied as to the second cause of action.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for a default judgment is GRANTED on default on the first cause of action for breach of contract; and it is further

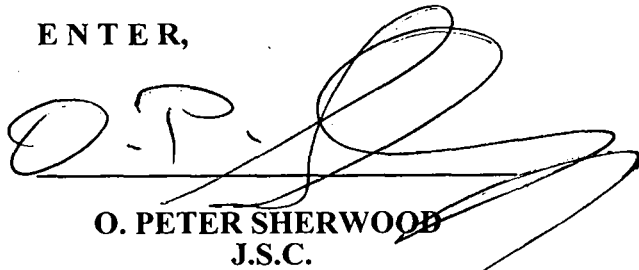
ORDERED that plaintiff’s motion for a default judgment is DENIED as to the second cause of action for a declaratory judgment; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff LF USA, INC. and against defendant THE EUROSTYLE GROUP LTD., in the sum of \$874,650.00, plus interest at the contract rate of 1.25% per month from August 31, 2013 until entry of judgment, as calculated by the Clerk in the amount of \$ _____, together with costs and disbursements in the amount of \$ _____ as taxed by the Clerk upon submission of an appropriate bill of costs, making in all a sum total of \$ _____ and that plaintiff have execution therefor; and it is further

ORDERED, that within thirty (30) days of entry, plaintiff shall serve a copy of this order with notice of entry upon defendants.

This constitutes the decision and order of the Court.

DATED: January 22, 2014

ENTER,

O. PETER SHERWOOD
J.S.C.