

Embroidery Indus., Inc. v RVC Enters. LLC
2015 NY Slip Op 31554(U)
August 17, 2015
Supreme Court, New York County
Docket Number: 652827/2012
Judge: O. Peter Sherwood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

-----X
EMBROIDERY INDUSTRIES, INC.,

Plaintiff,

-against-

**RVC ENTERPRISES LLC, ROC FASHIONS LLC
and AUSSIE FASHIONS LLC,**

Defendants.

DECISION AND ORDER

**Index No.: 652827/2012
Mot. Seq. No. 007**

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

Background

Before the Court is the plaintiff's third motion seeking entry of default judgment based upon the defendants' failure to appear at preliminary status conferences set for May 14, 2014, and December 9, 2014 (motion sequence 007). This is an action based upon the defendants' alleged non-payment for goods. The action was initiated by the filing and service of a summons and complaint on August 14, 2012. The complaint sought \$656,409.79 in damages. The defendants answered the complaint on December 20, 2012 generally denying all material allegations and asserting five (5) affirmative defenses including untimely delivery and defective goods.

By order dated April 30, 2013, the Court granted a motion by defendants' former counsel to be relieved (the "2013 Order"). The Court directed service of a copy of the 2013 Order upon defendants at their last known address by regular mail. The notice further provided that, as limited liability companies, the defendants must appear in this action by counsel and not *pro se*. According to former counsel's affidavit of service, he served defendants on May 8, 2013 with a copy of the 2013 Order and a notice directing defendants to select substitute counsel. The affidavit states that the 2013 Order and notice were served, as directed, upon defendants by regular mail at the address that defendants designated for service of process, and by email in addition. Nonetheless, substitute counsel for the defendants has not appeared in this action.

On April 1, 2014, the Court entered an order granting the plaintiff's motion for leave to amend its complaint (the "2014 Order"). The application for leave to amend sought to increase the amount of damages demanded to \$942,079.21 against each of the three defendants. The 2014 Order

additionally directed the parties to appear at a preliminary conference on May 14, 2014. The plaintiff's affidavit of service indicates that the 2014 Order along with notice of entry was served on each of the defendants on April 17, 2014 by mail at their last known address. The plaintiff appeared at the May 14th conference, but the defendants did not.

By notice of motion dated June 18, 2014, plaintiff moved for default judgment against the defendants based on their nonappearance at the May 14th conference. By Decision and Order dated October 7, 2014, the Court denied the motion. The Court noted that although defendants were in default, plaintiffs had failed to provide any evidence supporting their claims as required by CPLR 3215(f). The Decision and Order further provided for a status conference to be held on December 9, 2014. Once again, plaintiff's counsel appeared but the defendants did not.

By notice of motion dated January 9, 2015, plaintiff again moved for entry of default judgment, attaching copies of invoices to its motion papers. By Decision and Order dated April 21, 2015, the Court again denied the motion. Plaintiff's renewed motion again failed to submit either a verified complaint or an affidavit from anyone with personal knowledge of the facts. The invoices in and of themselves failed to evince any agreement between the parties whereby the defendants contracted to purchase the goods at issue, or that, even assuming there was such a contract, that the goods were ever delivered in accordance with such agreement, or that they were of sufficient quality (*see* Decision and Order dated April 21, 2015, NYSCEF Doc. No. 79, at 2-3).

Discussion

By this motion, plaintiff now moves for the third time for entry of default judgment. As noted in the Court's Decisions and Orders on the plaintiff's prior motions for default judgment, the defendants are in default by virtue of their failure to appear at the preliminary conferences on May 14, 2014 and December 9, 2014. In order to cure its failure to establish its *prima facie* entitlement to judgment on the prior motions, plaintiff now attaches copies of unpaid or partially unpaid invoices along with an affidavit from plaintiff's president Eli Kahen. However, Mr. Kahen's bare bones affidavit, which essentially consists of a recitation of the procedural history of this action with vague affirmations regarding "an arrangement" between plaintiff and defendants collectively, is again insufficient to sustain even plaintiff's lightened burden on this motion.

CPLR 3215(a) provides that "[w]hen a defendant has failed to appear, plead or proceed to

trial of an action reached and called for trial, . . . the plaintiff may seek a default judgment against him” (CPLR 3215[a]). A judgment by default requires “proof of the facts constituting the claim, the default and the amount due by affidavit made by the party”, or a verified complaint (CPLR 3215[f]; *Zelnik v. Bidermann Indus. U.S.A., Inc.*, 242 AD2d 227, 228 [1st Dept 1997]). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*Feffer*, 210 AD2d at 61).

Plaintiffs submissions are again insufficient to carry their burden of proof on this motion. Plaintiff’s president, Mr. Kahen indicates in his bare-bones affidavit that “Plaintiff and Defendant entered into an arrangement whereby it was agreed upon that from time to time, Defendant would request that Plaintiff design embroidery and screen printing on certain clothing Defendant would then place orders with Plaintiff to manufacture said designs on fabrics that would be provided by Plaintiff” (*see* Kahen aff, NYSCEF Doc. No. 81, ¶ 15). Mr. Kahen affirms that plaintiff performed these services and rendered invoices (*id.* at ¶ 16), which are attached to the motion papers (*see* Kahen aff, Ex. G, NYSCEF Doc. Nos. 88-89). However, Mr. Kahen’s affidavit indiscriminately affirms that “Plaintiff and Defendant” (singular) entered into this arrangement (*see* Kahen aff, NYSCEF Doc. No. 81, ¶ 15). Indisputably, there are three named defendants in this action. A review of the invoices indicates that each of the individual defendants was invoiced only for certain portions of the total amount demanded. Moreover, collectively as to all three defendants, the total amount of the invoices submitted does not equal the total amount demanded by Plaintiff. Neither the complaint nor plaintiff’s motion allege that defendants should be held jointly and severally liable for the entire alleged debt, nor allege any purported basis for doing so. As a result, plaintiffs have failed to establish the basic facts necessary for entry of default judgment against any of the defendants. For these reasons, the proposed judgment submitted by plaintiff is defective.

Accordingly, it is hereby

ORDERED that the motion for a default judgment is DENIED; and it is further

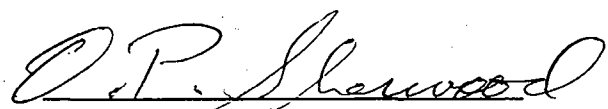
ORDERED that all counsel for the respective parties shall appear for a preliminary conference on Tuesday, October 6, 2015 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this Decision and Order together with notice of entry on the defendants within fourteen (14) days thereof.

This constitutes the decision and order of the Court.

DATED: August 17, 2015

ENTER,

A handwritten signature in cursive script, reading "O. Peter Sherwood", written in black ink.

O. PETER SHERWOOD
J.S.C.

8/17/15