

Wow-Shine Intl. Trade Ltd. v Bleu Coffee LLC
2021 NY Slip Op 32787(U)
December 20, 2021
Supreme Court, New York County
Docket Number: Index No. 652715/2019
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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INDEX NO. 652715/2019

WOW-SHINE INTERNATIONAL TRADE LIMITED,

MOTION DATE 06/08/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

BLEU COFFEE LLC and JEFFREY GOLD,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24

were read on this motion for

DEFAULT JUDGMENT

LOUIS L. NOCK, J.

Upon the foregoing documents, plaintiff's motion for entry of a default judgment and for leave to amend the caption is granted in part, in accord with the following memorandum decision.

Background

In this action to recover amounts owed for goods sold and delivered, plaintiff Wow-Shine International Trade Limited ("Plaintiff") moves for entry of a default judgment against defendants Bleu Coffee LLC ("Bleu") and Jeffery Gold ("Gold"). Plaintiff also moves for leave to amend the case caption to add the name Jeffery Goldenstein as an alias name of Gold. Plaintiff commenced this action by filing a summons with notice on May 7, 2019, followed by a verified complaint on July 8, 2019 (NYSCEF Doc Nos. 1, 3). An amended complaint was filed on June 18, 2021 (NYSCEF Doc No. 8). An affidavit of service filed in the action on June 22, 2019 indicates that a copy of the summons with notice was served upon Gold by service upon a person

of suitable age and discretion at the defendant's actual place of business on June 11, 2019 and a copy was mailed to him on June 12, 2019 (NYSCEF Doc No. 2). An affidavit of service filed on July 22, 2019 attests to service upon Bleu by service upon the Secretary of State on July 11, 2019 (NYSCEF Doc No. 5). Neither defendant has answered the complaint or otherwise appeared in the action to date. On April 3, 2021, Plaintiff submitted a proposed judgment pursuant to CPLR 3215 (a), but the judgment was rejected by the Clerk because it was submitted more than one year after the date of default. Plaintiff now moves for entry of a default judgment against both defendants and to amend the caption of the complaint to add the alias Jeffery Goldenstein to defendant Gold. There is no opposition to the motion.

Discussion

As a threshold issue, Plaintiff also moves this court to overlook its failure to file the motion for default within one year of the default. Pursuant to CPLR 3215 (c), "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, . . . unless sufficient cause is shown why the complaint should not be dismissed." "The language of CPLR 3215(c) is not discretionary, and a claim for which a default judgment is not sought within the requisite one-year period will be deemed abandoned" (*Wells Fargo Bank, N.A. v. Martinez*, 181 AD3d 470, 470 [1st Dept 2020]). "Notwithstanding, a claim will not be deemed abandoned if the party seeking a default judgment provides sufficient cause as to why the complaint should not be dismissed (CPLR 3215[c])" (*id.*). It has been further recognized that "as long as proceedings are being taken, and these proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal" (*Brown v Rosedale Nurseries, Inc.*, 259 AD2d 256, 257 [1st Dept 1999]).

As set forth in the affidavit of service, Plaintiff served the summons with notice upon Bleu by service upon the Secretary of State on July 11, 2019 (NYSCEF Doc No. 5). Where a corporation is served by service upon the Secretary of State pursuant to BCL 306 (b)(1), service is complete upon delivery of the summons and complaint to the secretary state and the defendant then has 30 days to appear in the action (BCL 306 [b][1] [“Service of process on such corporation shall be complete when the secretary of state is so served”; CPLR 320 [a]). The deadline for Bleu to appear was, therefore, August 10, 2019 (CPLR 320 [a]). Consequently, the original deadline for Plaintiff to move for entry of a default judgment was August 10, 2020. Plaintiff’s time to move for entry of a default judgment was also tolled from March 20, 2020 until November 4, 2020 by various Executive Orders issued by Governor Andrew Coumo in the wake of the COVID-19 pandemic (*see, e.g.*, Executive Order No. 202.8 [9 NYCRR 8.202.8]). A period of 223 days passed between the date of default, August 10, 2019, and the beginning of the toll on March 20, 2020, leaving 142 days to make the motion after the conclusion of the toll on November 4, 2020. Therefore, including the toll, Plaintiff’s deadline to move for entry of a default judgment was March 26, 2021. Plaintiff first sought entry of a judgment on April 3, 2019 by submitting a proposed judgment to the Clerk of the Court pursuant to CPLR 3215 (a). The proposed judgment was rejected because Plaintiff’s statutory deadline to seek entry of a judgment from the Clerk had elapsed. Plaintiff then filed this motion on June 18, 2021.

In light of Plaintiff’s failure to move within one year, the court must determine whether sufficient cause exists regarding why the complaint should not be dismissed. The Swidler affirmation asserts that Plaintiff timely sought entry of a judgment by the Clerk within one year because the “very earliest a default money judgment court have been sought . . . is August 22, 2019 (30 days after the affidavit if service was efiled)”. This appears to be an oversight by

Plaintiff's counsel of the provision of BCL 306 [b][1] which provides that "[s]ervice of process on such corporation shall be complete when the secretary of state is so served," in favor of the rule for substitute service upon an individual whereby service of process is complete ten days after filing of the affidavit of service (CPLR 308 [2]). Plaintiff's counsel thereafter calculates the deadline to move for entry of a default from this incorrect date of default, which results in an incorrect deadline to move for entry of a default judgment. Effectively, this amounts to law office failure. Plaintiff also offers, as further explanations for its failure to seek timely entry of a default judgment within one year of default, the ongoing COVID-19 pandemic, temporary closure of the Courts for a period of time during the pandemic, and "difficulties encountered in communications with plaintiff in China" (Swidler aff ¶ 7). The Appellate Division, First Department, has held that law office failure constitutes a reasonable excuse for the failure to timely move for a default judgment, particularly where there is no indication that the defaulting party has been prejudiced by the delay (*see Bazac v Odelia Enters.*, 272 AD2d 226, 226-27 [1st Dept 2000]). In light of the law office failure being specifically identified here and in light of the additional excuses proffered by Plaintiff's counsel, and in the absence of undue prejudice against Bleu, it is the determination of this court that sufficient cause why the complaint should not be dismissed has been shown. Therefore, this court will consider Plaintiff's motion for entry of a default judgment.

A plaintiff that seeks entry of a default judgment for a defendant's failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant's default (CPLR 3215). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). "[D]efaulters are deemed to have admitted all

factual allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Nevertheless, “CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

As the motion pertains to Bleu, Plaintiff has met its burden on this motion by submission of the affidavit of service demonstrating service of the summons and notice upon Bleu (NYSCEF Doc No. 5), an affirmation of its counsel, Steven A. Swidler, Esq., attesting to the default (NYSCEF Doc No. 10, ¶ 4), the verified complaint (NYSCEF Doc No. 3), and an affidavit of Wei Wei Li, an authorized agent of Plaintiff, which attests to the facts constituting Plaintiff’s claim (NYSCEF Doc No. 11). In the affidavit of facts, Li reaffirms the allegations set forth in the verified complaint and attests to the amount owed. As set forth in the verified complaint, Plaintiff sold and delivered certain apparel goods to Bleu from the period between May 2, 2018 through December 28, 2019, which Bleu accepted, but did not remit for payment for (NYSCEF Doc No. 3 ¶¶ 7-10). As set forth in the verified complaint and confirmed in the affidavit, the remaining balance for all outstanding invoices is \$2,077,102.59 (NYSCEF Doc No. 3 ¶¶ 11-12; NYSCEF Doc No. 11 ¶ 3). However, Plaintiff did not submit copies of the invoices or other proof of its damages for consideration on the motion. Therefore, Plaintiff’s motion for entry of a default judgment against Bleu is granted as to liability and the case will be referred to a Special Referee or Judicial Hearing Officer to determine the amount of Plaintiff’s damages.

As against Gold, the complaint interposes a single cause of action to pierce the corporate veil in order to hold Gold personally responsible for the debt owed by Bleu. Generally, New

York courts will disregard the corporate form or “pierce the corporate veil” when necessary “to prevent fraud or achieve equity” (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018]). “[A] plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury” (*id.*). “At the pleading stage, a plaintiff must do more than merely allege that [defendant] engaged in improper acts or acted in bad faith while representing the corporation” (*id.* [internal quotations removed]; see also *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 146 [2d Dept 2009] [citing indicia warranting veil-piercing]). The plaintiff must adequately allege the existence of a corporate obligation and that defendant exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice” (*Cortlandt St. Recovery Corp.*, 31 NY3d at 47).

The complaint in this action alleges, *inter alia*, that Gold, “as sole member and/or controlling officer and/or controlling manager of defendant Bleu Coffee, through his dominance and control of Bleu Coffee, has abused the privilege of doing business in corporate and/or LLC form” (NYSCEF Doc No. 3, complaint ¶ 18); “personally determines which creditors of defendant Bleu Coffee get paid, and which creditors do not get paid” (*id.* ¶ 19); ordered goods on behalf of Bleu knowing that it did not intend to pay for the goods or was not financially able to pay for the goods (*id.* ¶ 23); intentionally and wrongfully diverted assets of Bleu to other businesses in which he has an interest (*id.* ¶ 24); and “failed to adhere to corporate/LLC statutory formalities for defendant Bleu Coffee, inadequately capitalized defendant Bleu Coffee and/or improperly commingled assets belonging to defendant Bleu Coffee” (*id.* ¶ 28). All of these

allegations are alleged upon information and belief, no specific factually allegations are alleged, and Plaintiff offers no evidence on the motion to support its claim to pierce the corporate veil. Even under the more liberal pleading standard set forth in CPLR 3013, these conclusory allegations, alleged upon information and belief, are not sufficient to state a cause of action against Gold to pierce the corporate veil because it does not allege facts that satisfy the essential elements of the claim (*see East Hampton Union Free School Dist. V Sandpebble Builders, Inc.*, 66 AD3d 122, 127 [“even under the liberal notice pleading requirements of CPLR 3013, a complaint still must allege . . . the material elements of each cause of action asserted.”]; *see also Dabrowski v Abax Inc.*, 64 AD3d 426, 427 [64 AD3d 426, 427 [1st Dept 2009] [“cause of action for piercing the corporate veil to hold the individual defendants liable should have been dismissed, since the sole allegation of ‘domination’ in the complaint is that the principals made the decisions for the corporation”]). Consequently, that portion of the motion that seeks entry of a default judgment against Gold is denied (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted] [“CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action”])).

Finally, Plaintiff moves for leave to amend the caption of the action to add the alias of Jeffrey Goldstein to the name for defendant Gold. Leave to amend a pleading “should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Y.A. v Conair Corp.*, 154 AD3d 611, 612 [2017]). Plaintiff has sufficiently demonstrated that it has good cause to believe that Jeffrey

Goldstein is an alias of defendant Gold, who would suffer no prejudice from such amendment.

Therefore, this portion of the motion is granted.

Accordingly, it is

ORDERED that the motion is granted in part, and to the extent set forth herein; and it is further

ORDERED that the portion of the motion that seeks to amend the caption is granted, and the caption is hereby amended as follows:

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WOW-SHINE INTERNATIONAL TRADE LIMITED,

Plaintiff,

- v -

BLEU COFFEE LLC and JEFFREY GOLD a/k/a JEFFREY
GOLDSTEIN,

Defendants.

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and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Wow-Shine International Trade Limited and against defendant Bleu Coffee LLC on the issue of liability, with the issue of damages to be determined by a Judicial Hearing Officer ("JHO") or Special Referee; and it is further

ORDERED that the issue of damages is severed and a JHO or Special Referee shall be designated to conduct an inquest and determine the amount of plaintiff's damages, which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that the remainder of the motion is denied.

This constitutes the Decision and Order of the court.

ENTER:

Louis L. Nock

<u>12/20/2021</u>		<u>LOUIS NOCK, J.S.C.</u>	
DATE			
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE