

Zedge, Inc. v Voice Express Ltd
2023 NY Slip Op 30395(U)
February 7, 2023
Supreme Court, New York County
Docket Number: Index No. 651274/2021
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART IV

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ZEDGE, INC.,

Plaintiff,

**DECISION FOLLOWING
INQUEST**

-against-

Index No. 651274/2021

VOICE EXPRESS LTD and JAMES HOWARD,

Defendants.

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HON. FRANK P. NERVO, J.S.C.

By decision and order on motion sequence 001, the Hon. Debra James, J.S.C. found defendants in default and granted plaintiff a default judgment against same, with the determination of damages and attorneys' fees to be calculated at inquest (*see* NYSCEF Doc. No. 40). By administrative order, the inquest in this matter was assigned to Part IV, before the Hon. Frank P. Nervo, J.S.C. Thereafter, by order dated December 02, 2022, the Court directed the inquest proceed on paper submissions on January 23, 2023, unless defendants appeared in this matter and sought cross-examination (*see* NYSCEF Doc. No. 41). The Court has received papers in support of plaintiff's damages (NYSCEF Doc. Nos. 42 - 49). Defendants have neither submitted papers in opposition nor sought to cross-examine plaintiff's witnesses; defendants have not appeared.

Turning to the merits of the inquest and considering the procedural posture of this matter, namely defendants' default, it is beyond cavil that defendants have admitted all traversable allegations in the complaint, including liability (*Amusement Bus. Underwriters v. American Intl. Group*, 66 NY2d 878 [1985]; *Curiale v. Ardra Ins. Co., Ltd.*, 88 NY2d 268 [1996]). Whether a default is premised upon failure to answer or upon striking of an answer is of no moment (*Abbas v. Cole*, 44 AD3d 31, 33 [2d Dept 2007]). Accordingly, the only issue before the Court is "plaintiff's conclusion as to damages" (*Amusement Bus. Underwriters v. American Intl. Group, supra*; *Curiale v. Ardra Ins. Co., Ltd, supra*).

Plaintiff has established the following by a preponderance of the evidence (*see generally* NYSCEF Doc. Nos. 42 - 49). Plaintiff provides, inter alia, ringtones for purchase on a smartphone application, website, and social media platforms. Plaintiff entered into a Ringtone Distribution Agreement with defendants whereby defendants provided ringtones for plaintiff to distribute on its aforementioned services (NYSCEF Doc. No. 46). That agreement further provided that defendants would indemnify plaintiff for, inter alia, "claims of infringement or misappropriation of a third party's intellectual property, privacy or other rights" arising out of the ringtones provided by defendants, including reasonable attorneys' fees. (*id.* at ¶ 6 "Indemnification by Licensor").

Thereafter, plaintiff was sued for license infringement by Warner Chapel Music related to a ringtone provided by defendant. Defendant did not respond to plaintiff's requests to participate or respond to the Warner Chapel Music lawsuit, and plaintiff settled that action for \$150,000.00 (NYSCEF Doc. Nos. 42 and 48). Accordingly, plaintiff is entitled to recover \$150,000.00 from defendants.

Turning to the attorneys' fees sought by plaintiff, where attorney fees are authorized, either by statute or agreement, the fee sought must be reasonable; where the fee is unreasonable, inflated, or needlessly incurred, the Court may dismiss the claim for attorney's fees (*American Motorists Ins. Co. v. Napco Sec. Systems Inc.*, 244 AD2d 197 [1st Dept 1997]). In determining the reasonableness of attorney's fees, the Court considers the attorney's affidavit and submissions to elicit the "difficult of the issues and the skill required to resolve them; the lawyers' experience, ability and reputation; the time and labor required; the amount involved and benefit resulting to the client from the services; the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained and the responsibility involved" (*Bankers Federal Sav. Bank FSB v. Off West Broadway Developers*, 224 AD2d 376 [1st Dept 1996]).

Here, notably absent from plaintiff's submissions is an affirmation by plaintiff's counsel. Nevertheless, plaintiff has established that it paid its attorney \$5,000.00 for legal services in this matter (NYSCEF Doc. No. 49). Considering the issues raised herein, the skill required to resolve the issues, the amount in controversy, the results obtained, and the benefit to the client, the Court finds \$5,000.00 reasonable compensation.

Finally, turning to the interest sought on the above awards, plaintiff prays for interest on the award from June 15, 2020 (NYSCEF Doc. No. 42.). The Court finds that interest on the breach of the lease agreement, as a contract, should be calculated by the date of said breach (*Brushston-Moira Cent. School Dist. v. Fred H. Thomas Associates, P.C.*, 91 NY2d 256, 261 [1998]; *Rodriguez v. Moore-McCormack Lines*, 32 NY2d 425, 429 [1973]). However, the significance of the June 15, 2020, date cannot be ascertained by this Court. Plaintiff's complaint seeks interest from May 21, 2020, as the date plaintiff settled the lawsuit by Warner Chapel Music, as did plaintiff's default motion (NYSCEF Doc. Nos. 1, 28 at ¶ 10, and 29 at ¶ 8). The Court's default judgment was rendered on October 15, 2021. The Court, therefore, determines the date of defendants' breach to be the date the underlying Warner Chapel Music lawsuit

was settled, May 21, 2020, and further finds interest is appropriate from that date.

Interest on the award of legal fees is properly calculated from the date plaintiff was determined to be the prevailing party (*see Solow Mgmt. Corp. v. Tanger*, 19 AD3d 225 [2d Dept 2005]). Here, the Court's decision and order on motion sequence 001, granting plaintiff a default judgment against defendants, is the date plaintiff was determined to be the prevailing party on the issue of liability. Accordingly, interest from the date that Decision and Order was deemed filed, October 15, 2021, is appropriate.

Accordingly, it is

ORDERED and ADJUDGED that plaintiff, ZEDGE, INC., 1178 Broadway Suite 1450, 3rd Floor, New York, NY 10001, shall have judgment, jointly and severally, for breach of the Ringtone Distribution Agreement in the amount of \$150,000.00 as against defendants, VOICE EXPRESS LTD., Belmont House, Canterbury Road, Swingfield, Kent, England CT187HX, and JAMES HOWARD, Belmont House, Canterbury Road, Swingfield, Kent, England CT187HX, with interest at the statutory rate from May 21, 2020, as calculated

by the Clerk of the Court and together with costs and disbursements as taxed
by the Clerk of the Court; and it is further

ORDERED and ADJUDGED that plaintiff, ZEDGE, INC., 1178
Broadway Suite 1450, 3rd Floor, New York, NY 10001, shall have judgment,
jointly and severally, for attorney's fees in the amount of \$5,000.00 as against
defendants, VOICE EXPRESS LTD., Belmont House, Canterbury Road,
Swingfield, Kent, England CT187HX, and JAMES HOWARD, Belmont
House, Canterbury Road, Swingfield, Kent, England CT187HX, with interest
at the statutory rate from October 15, 2021, as calculated by the Clerk of the
Court and together with costs and disbursements as taxed by the Clerk of the
Court; and it is further

ORDERED that judgment shall be submitted to the Clerk of the Court,
unless directed otherwise by that office, and not to chambers.

THIS CONSTITUTES THE DECISION, ORDER, AND JUDGMENT OF THE COURT FOLLOWING INQUEST.

Dated: February 7, 2023

E N T E R:



HON. FRANK P. NERVO
J.S.C.