

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VLADIMIR FRANK KOZINA,
Plaintiff,
v.
PONIE JACKSON,
Defendant.

Case No. 2:23-cv-201-DJC-CSK

ORDER DENYING WITHOUT PREJUDICE
PLAINTIFF'S MOTION FOR DEFAULT
JUDGMENT AND DISMISSING
COMPLAINT WITH LEAVE TO AMEND

(ECF No. 14)

Plaintiff Vladimir Frank Kozina asserts claims for copyright infringement and unfair competition/ trade practices against Defendant Ponie Jackson a/k/a Ponie Ryan, seeking monetary damages, punitive damages, an injunction, and other relief. Compl. (ECF No. 1). Defendant has not made an appearance in this action, and on April 19, 2023, Clerk's Default was entered against her. (ECF No. 9.) Presently pending before the Court is Plaintiff's motion for default judgment (ECF No. 14), which Defendant has not opposed and was taken under submission without argument pursuant to Local Rules 230(c) and 230(g).¹ Plaintiff's motion for default judgment is DENIED without prejudice. In addition, the Complaint is DISMISSED with LEAVE TO AMEND.

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¹ This motion is referred to the undersigned pursuant to Local Rule 302(c)(19) and 28 U.S.C. § 636(b)(1)(A).

1 **I. BACKGROUND**

2 **A. Facts**

3 The Complaint alleges that Plaintiff has two registered copyrights:

4 (1) VAU001378161, a graphic of a full-frontal ram created in 2007 and registered on
5 August 12, 2019; and (2) VAU001381368, a visual graphic of a jumping ram in front of a
6 letter block SM created in 2014 and registered on August 12, 2019. Compl. ¶ 4. Plaintiff
7 has licensed both copyrights through a charitable donation to Saint Mary's High School
8 in Stockton, California, and has not licensed the copyrights to any other person or entity.
9 *Id.* at ¶ 7.

10 The Complaint further alleges that Defendant, an individual, falsely presents
11 herself as a school photographer "to gain entry into [] various venues, including high
12 schools, athletic events and other youth sports primarily in the Stockton and San
13 Joaquin County area." Compl. ¶ 9. Defendant allegedly has published and sold
14 photographs and posters that have incorporated Plaintiff's copyrights "in excess of 500
15 times." *Id.* at ¶ 10. Plaintiff first became aware of Defendant's alleged infringement in
16 2022, and sent Defendant a cease and desist letter on October 18, 2022. *Id.* at ¶¶ 11-12.
17 Defendant allegedly represented to consumers that her use of the copyrights was
18 permitted, "induc[ing] members of the general public to purchase photographs, posters
19 and other consumer goods" featuring the Works. *Id.* at ¶ 14.

20 **B. Procedural Posture**

21 Plaintiff filed the Complaint on January 31, 2023, asserting claims for copyright
22 infringement (17 U.S.C. § 106) and unfair competition/ trade practices (Cal. Bus. Code
23 § 17200) against Defendant. Compl. The Complaint seeks statutory, compensatory, and
24 punitive damages; disgorgement of profits; and an order enjoining Defendant's use of
25 the copyrights, among other relief. *Id.* Plaintiff is a licensed California attorney and
26 represents himself in this matter. See *id.* at 1 (caption); 10/23/2023 Declaration of
27 Vladimir F. Kozina at 1 (ECF No. 11); 10/24/2023 Declaration of Vladimir F. Kozina at 1
28 (ECF No. 14-2); 12/4/2023 Declaration of Vladimir F. Kozina at 1 (ECF No. 16). On

1 February 1, 2023, the Clerk of the Court issued the summons and filed a “Report on the
2 Filing or Determination of an Action or Appeal Regarding a Copyright” under 17 U.S.C.
3 § 508. (ECF No. 4-3.)

4 On March 29, 2023, Plaintiff filed a notice of execution of summons. (ECF No. 5.)
5 This notice indicated that on March 8, 2023, a third party process server personally
6 served on Defendant a copy of the summons, the Complaint, the 17 U.S.C. § 508
7 Copyright Report, and other case documents. (ECF No. 5.) Despite this personal
8 service, Defendant did not respond to the Complaint or make an appearance. See
9 Docket. On April 18, 2023, Plaintiff requested entry of default (ECF No. 8), which was
10 entered by the Clerk the following day (ECF No. 9).

11 On October 20, 2023, the assigned district judge ordered Plaintiff to show cause
12 why this action should not be dismissed for failure to prosecute. (ECF No. 10.) On
13 October 23, 2023, Plaintiff responded to the order to show cause, stating that he “forgot
14 to follow up” due to other client matters, including trials in May and June 2023, and
15 arbitration and mediation work. 10/23/2023 Kozina Decl. at 1-2. On October 24, 2023,
16 Plaintiff moved for default judgment against Defendant in a half-page long motion. (ECF
17 No. 12.) The motion was improperly set before the district judge, so Plaintiff was ordered
18 to re-notice the motion before the assigned magistrate judge. (ECF No. 13.) On
19 November 14, 2023, Plaintiff refiled the motion for default judgment, but incorrectly set it
20 for a hearing before a different magistrate judge who was not assigned to the case. (ECF
21 No. 14.) On November 16, 2023, the Court issued a minute order re-setting Plaintiff’s
22 motion for a December 19, 2023 hearing before the assigned magistrate judge and
23 directing Plaintiff to personally serve Defendant with a copy of the default judgment
24 motion and the minute order. (ECF No. 15.)

25 On December 4, 2023, Plaintiff filed a declaration indicating personal service had
26 been attempted in compliance with the Court’s November 16, 2023 minute order. (ECF
27 No. 16.) This declaration indicates a third party process server attempted to serve
28 Defendant six times between November 22, 2023 and December 3, 2023, with no

1 success. *Id.* at Exh. A (12/4/2023 Process Server Affidavit of Reasonable Diligence).
2 Service was attempted at the same address at which Defendant was previously and
3 successfully served. *Id.* at 2. Defendant did not respond to the motion for default
4 judgment, and so the assigned magistrate judge took Plaintiff's motion under submission
5 for resolution on the written briefing. (ECF No. 17.) Upon retirement of the magistrate
6 judge, the case was reassigned to the undersigned. (ECF No. 18.)

7 II. LEGAL STANDARDS

8 Under Federal Rule of Civil Procedure 55, default may be entered against a party
9 against whom a judgment for affirmative relief is sought who fails to plead or otherwise
10 defend against the action. See Fed. R. Civ. P. 55(a). However, this default does not
11 automatically entitle the plaintiff to a judgment. *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F.
12 Supp. 2d 1172, 1174 (C.D. Cal. 2002) (citations omitted). The decision to grant or deny
13 the entry of default judgment is within the district court's discretion. *NewGen, LLC v.*
14 *Safe Cig, LLC*, 840 F.3d 606, 616 (9th Cir. 2016).

15 In determining whether to enter default judgment, courts consider the following
16 factors:

- 17 1. the possibility of prejudice to the plaintiff;
- 18 2. the merits of the substantive claim(s);
- 19 3. the sufficiency of the complaint;
- 20 4. the amount of money at stake in the lawsuit;
- 21 5. whether there are any disputes of material fact;
- 22 6. whether the defendant's default was due to excusable neglect; and
- 23 7. the strong policy favoring decisions on the merits.

24 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). The Ninth Circuit has long
25 disfavored default judgments, counseling that cases be decided on the merits "whenever
26 reasonably possible. *Id.* at 1472.

27 Once a default is entered, all well-pled allegations in the complaint regarding
28 liability are deemed true. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir.

2002). “On the other hand, a defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law.” *United States v. Cathcart*, 2010 WL 1048829, at *4 (N.D. Cal. Feb. 12, 2010) (citation omitted). “[I]t follows from this that facts which are not established by the pleadings of the prevailing party, or claims which are not well-pleaded, are not binding and cannot support the judgment.” *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978). Necessary facts not contained in the pleadings and claims which are legally insufficient are not established by default. *DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007). Further, a plaintiff’s allegations regarding damages are not deemed true at default and the plaintiff bears the burden to prove damages through some evidence. See Fed. R. Civ. P. 55(b)(2)(C); *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977); *Penpower Tech. Ltd. v. S.P.C. Tech.*, 627 F. Supp. 2d 1083, 1093-94 (N.D. Cal. 2008) (“Although the Court must generally accept the factual allegations of the Complaint as true, allegations relating to the amount of damages must be supported by some evidence. As there is no other evidence, aside from the factual allegation in the Complaint, that Defendants acted willfully, the Court cannot find that such was the case.”) (internal citation omitted).

III. DISCUSSION

Before turning to the default judgment motion, the Court first addresses two preliminary matters: jurisdiction and the construction of the pleadings given that Plaintiff is a licensed attorney representing himself in this lawsuit.

A. Jurisdiction

When default judgment is sought, the “district court has an affirmative duty to look into its jurisdiction over both the subject matter and the parties.” *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999) (citations omitted). The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under federal copyright law, 17 U.S.C. § 101, et seq. The Court has supplemental jurisdiction over the state law unfair competition claim under 28 U.S.C. § 1367, given the relatedness of the claims. See Compl. In addition, the Court has personal jurisdiction over Defendant, who is a

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