

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICHAEL GRECCO PRODUCTIONS,
INC.,

Plaintiff,

v.

ENTHUSIAST GAMING, INC.,

Defendant.

Case No. 19-CV-06399-LHK

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
DEFAULT JUDGMENT**

Re: Dkt. No. 31

Before the Court is Plaintiff Michael Grecco Productions, Inc.’s (“Plaintiff”) renewed motion for default judgment. ECF No. 31. Having considered the parties’ submissions, the relevant law, and the record in this case, the Court GRANTS IN PART and DENIES IN PART Plaintiff’s motion for default judgment.

I. BACKGROUND

A. Factual Background

Plaintiff is a photography agency with its principal place of business in Santa Monica, California. ECF No. 1 (“Compl.”) ¶ 7. Plaintiff owns the copyrights to photographs taken by Michael Grecco and licenses those photographs to third parties on his behalf. *Id.* ¶ 7. Plaintiff’s business is to provide celebrity photographs to major media publications. *Id.* ¶ 13.

1 With respect to the instant case, Plaintiff is the owner and exclusive copyright holder of a
2 promotional still photograph (the “Photograph”) of actress Nana Visitor as Kira Nerys, a fictional
3 character from the television show “Star Trek: Deep Space Nine.” *Id.* ¶¶ 15–16. Plaintiff
4 registered the Photograph in compliance with the Copyright Act and obtained a Certificate with
5 Registration No. VA 1-736-729 (eff. July 7, 2010). *Id.* ¶ 16.

6 Defendant Enthusiast Gaming Inc. (“Defendant”) is a Canadian-owned corporation doing
7 business as Destructoid, headquartered in San Francisco, California. *Id.* ¶ 5. According to Plaintiff,
8 Defendant uses celebrity images to drive internet traffic to its website to increase advertising
9 revenue, and a large portion of Defendant’s revenue increases with the number of visitors who
10 click on its website and subsequently view featured third-party advertisements, *id.* ¶¶ 14, 19–20.

11 Plaintiff alleges that Defendant used Plaintiff’s Photograph on its website without license
12 by “prominently featuring” the Photograph to promote articles and content to increase viewership.
13 *Id.* ¶ 21. Specifically, Plaintiff alleges that Defendant published the Photograph on October 15,
14 2017 without any authorization or permission from Plaintiff. *Id.* ¶¶ 22–23. Plaintiff alleges that the
15 Photograph was published on Defendant’s website to accompany an article written by CJ
16 Andriessen, Defendant’s features editor. *Id.* Plaintiff states that Defendant continued to display the
17 Photograph through the filing of this complaint and only took down the Photograph earlier this
18 year. *Id.* ¶ 22; ECF No. 23 at 10. Plaintiff further alleges that Defendant did not pay a license fee,
19 inquire about the availability of a license, or confirm whether the Photograph had been authorized
20 for use on Defendant’s website before, during, or after its publication of the Photograph. Compl. ¶
21 28.

22 **B. Procedural History**

23 On October 7, 2019, Plaintiff filed a complaint against Defendant that alleged two claims
24 for copyright infringement and vicarious and/or contributory copyright infringement. Compl.
25 ¶¶ 29–49. Plaintiff sought both injunctive relief and statutory damages. *Id.* ¶ 2.

26 On January 2, 2020, Plaintiff filed a case management statement noting that “Defendant
27 was served with the summons and complaint, by substitute service, on November 11, 2019,” but

1 that Defendant had not “appeared, answered, or otherwise responded to the complaint, and
2 plaintiff’s counsel ha[d] not been contacted by any counsel purporting to represent [D]efendant.”
3 ECF No. 10. On January 3, 2020, the Court ordered Plaintiff to file proof of service. ECF No. 12.
4 On January 3, 2020, Plaintiff filed a proof of service indicating that Plaintiff served Bill Doe, an
5 “[e]mployee at Earth Class mail,” in person on October 10, 2019 and by mail on October 14,
6 2019. ECF No. 13.

7 That same day, the Court ordered Plaintiff to file a statement that explained (1) why
8 service on Bill Doe was proper, and (2) why Plaintiff previously stated that Defendant was served
9 on November 11, 2019 when the proof of service stated that Defendant was served on October 10,
10 2019 and October 14, 2019. ECF No. 14. On January 5, 2020, Plaintiff filed a statement in
11 response to the Court’s order regarding service. ECF No. 15. Plaintiff addressed service of process
12 under California Code of Civil Procedure Section 415.20(a) and explained that service of the
13 summons and complaint did in fact occur on October 10, 2019 and October 14, 2019, as indicated
14 by the filed proof of service. *Id.* at 1–2, 3–4.

15 On February 8, 2020, Plaintiff moved for entry of default against Defendant. ECF No. 18.
16 On February 11, 2020, the Clerk entered default against Defendant. ECF No. 19. On April 7,
17 2020, Plaintiff filed a motion for default judgment. ECF No. 23.

18 On July 22, 2020, the Court denied Plaintiff’s motion for default judgment without
19 prejudice. ECF No. 30. The Court concluded that Plaintiff had not established that Defendant was
20 properly served for three reasons. *Id.* at 8–11. First, Plaintiff had not satisfied the requirements for
21 substitute service in California Code of Civil Procedure Section 415.20(a) because Plaintiff had
22 not stated that prepaid postage was included in mailing the summons and complaint to Defendant.
23 *Id.* at 8. Second, Plaintiff had not provided an affidavit of the person who served Defendant as
24 required by California Code of Civil Procedure Section 417.10(a). *Id.* at 9. Finally, Plaintiff had
25 not established that the summons included a notice as required by California Code of Civil
26 Procedure Section 412.30. *Id.* at 9–10. The Court thus denied Plaintiff’s motion for default
27 judgment without prejudice. The Court ordered Plaintiff to either (1) file a new motion for default

1 judgment and declarations and affidavits demonstrating compliance with the California Code of
2 Civil Procedure requirements or (2) propose a schedule for promptly serving Defendant. *Id.* at 11.

3 On August 18, 2020, Plaintiff filed the instant motion for default judgment. ECF No. 31
4 (“Mot.”). Plaintiff also filed supporting declarations from Michael Grecco, the principal and owner
5 of Plaintiff; Peter Perkowski, counsel for Plaintiff in the instant case; and Joseph Buchanan, the
6 person who served Defendant. *See* Grecco Decl.; Perkowski Decl.; Buchanan Decl.

7 **II. LEGAL STANDARD**

8 Pursuant to Federal Rule of Civil Procedure 55(b)(2), the Court may enter a default
9 judgment when the Clerk, under Rule 55(a), has previously entered a party’s default. Fed. R. Civ.
10 P. 55(b). “The district court’s decision whether to enter a default judgment is a discretionary one.”
11 *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Once the Clerk enters default, all well-
12 pleaded allegations regarding liability are taken as true, except with respect to damages. *See Fair*
13 *Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002) (“With respect to the determination
14 of liability and the default judgment itself, the general rule is that well-pled allegations in the
15 complaint regarding liability are deemed true.”); *TeleVideo Sys. v. Heidenthal*, 826 F.2d 915, 917–
16 18 (9th Cir. 1987) (“[U]pon default the factual allegations of the complaint, except those relating
17 to the amount of damages, will be taken as true.”); *Philip Morris USA v. Castworld Prods.*, 219
18 F.R.D. 494, 499 (C.D. Cal. 2003) (“[B]y defaulting, Defendant is deemed to have admitted the
19 truth of Plaintiff’s averments.”). “In applying this discretionary standard, default judgments are
20 more often granted than denied.” *Philip Morris*, 219 F.R.D. at 498.

21 “Factors which may be considered by courts in exercising discretion as to the entry of a
22 default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of
23 plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in
24 the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was
25 due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil
26 Procedure favoring decisions on the merits.” *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir.
27 1986).

1 **III. DISCUSSION**

2 **A. Jurisdiction**

3 “When entry of judgment is sought against a party who has failed to plead or otherwise
4 defend, a district court has an affirmative duty to look into its jurisdiction over both the subject
5 matter and the parties. A judgment entered without personal jurisdiction over the parties is void.”
6 *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999) (citations omitted). In order to avoid the entry of an
7 order of default judgment that may subsequently be attacked as void, the Court must determine
8 whether jurisdiction over the instant case exists.

9 The Court begins with subject matter jurisdiction and then proceeds to personal
10 jurisdiction. For the Court to exercise personal jurisdiction over a defendant, the defendant must
11 also have been served in accordance with Federal Rule of Civil Procedure 4. Accordingly, the
12 Court then turns to service of process.

13 **1. Subject Matter Jurisdiction**

14 Here, Plaintiff brings this action pursuant to federal law, namely the Copyright Act of
15 1976, 17 U.S.C. § 101, *et seq.* Therefore, the Court is satisfied that the Court has subject matter
16 jurisdiction pursuant to 28 U.S.C. § 1331. 28 U.S.C. § 1331 (“The district courts shall have
17 original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the
18 United States.”). The Court proceeds to consider whether the Court possesses personal jurisdiction
19 over Defendant.

20 **2. Personal Jurisdiction**

21 “The party seeking to invoke the court’s jurisdiction bears the burden of establishing that
22 jurisdiction exists.” *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (citing *Data Disc, Inc. v.*
23 *Sys. Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). Personal jurisdiction over an out-of-state
24 defendant is appropriate if the relevant state’s long-arm statute permits the assertion of jurisdiction
25 without violating federal due process. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797,
26 800–01 (9th Cir. 2004). California’s long arm statute, Cal. Civ. Proc. Code § 410.10, is co-
27 extensive with federal due process requirements, and therefore the jurisdictional analyses under

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