

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

INTENZE PRODUCTS, INC.,

Plaintiff,

v.

Case No: 8:15-cv-1074-T-36UAM

DEAD MAN SUPPLIES CORP., NANCY
PARKER and KEVIN PARKER,

Defendants.

ORDER

This cause comes before the Court upon Plaintiff Intenze Products, Inc.’s Motion for Default Judgment Against Defendants (Doc. 46); Defendant Nancy Parker’s (“Nancy”) response to the Motion (Doc. 48); and Plaintiff’s Supplemental Memorandum of Law in Support of its Motion for Default Judgment against Defendants (Doc. 52). Defendants Dead Man Supplies Corp. (“Dead Man”) and Kevin Parker (“Kevin”) failed to respond to the Motion, and the time to do so has expired. The Court, having considered the Motion, the Supplemental Memorandum, and being fully advised in the premises, will now GRANT-IN-PART and DENY-IN-PART the Motion.

I. STATEMENT OF FACTS

This is an action for trademark and copyright infringement. The Complaint alleges as follows: Plaintiff is a manufacturer, developer, marketer, and distributor of tattoo ink. Doc. 1 (“Compl.”) ¶ 14. Plaintiff has common law trademarks in INTENZE and lines of INTENZE ink, as well as several federally registered trademarks, including INTENZE, INTENZE PROD., and ZUPER BLACK (collectively, the “Intenze Marks”). *Id.* ¶ 18. Plaintiff also owns registered and unregistered copyrights in relation to the labeling and packaging of INTENZE ink (collectively, the “Intenze Works”). *Id.* ¶ 19.

Nancy and Kevin are individuals who own Dead Man (collectively, “Defendants”). *Id.* ¶ 11. In November 2013, Plaintiff filed a lawsuit in the Southern District of New York against one of Defendants’ suppliers (“New York Lawsuit”). *Id.* ¶ 32. In February 2014, Plaintiff discovered that Defendants were advertising and selling products bearing the Intenze Marks and/or the Intenze Works, and/or products substantially similar to the Intenze Marks and/or the Intenze Works, through their retail store as well as their website, without Plaintiff’s permission. *Id.* ¶¶ 25, 27-28. Plaintiff served Defendants with a cease and desist letter, requesting that Defendants voluntarily surrender the infringing products. *Id.* ¶ 29. In the presence of Plaintiff’s investigators, Defendants pulled the infringing products from their shelves, attempted to peel the labels containing the Intenze Marks and Intenze Works off of the products, and placed the products into a box. *Id.* ¶ 30. However, Defendants refused to surrender the infringing products to Plaintiff’s investigators. *Id.*

Shortly thereafter, Plaintiff amended its complaint in the New York Lawsuit to add Tattoo Supplies Wholesale Corporation a/k/a Dead Man Tattoo Supplies as a party. *Id.* ¶ 32. In April 2014, the Clerk entered a default against Dead Man in the New York Lawsuit. *Id.* Nancy subsequently sent correspondence to the judge in the New York Lawsuit indicating that she is the owner of Dead Man but that Dead Man is not affiliated with Tattoo Supplies Wholesale Corporation. *Id.* In January 2015, Plaintiff voluntarily dismissed Tattoo Supplies Wholesale Corporation from the New York Lawsuit. *Id.*

Despite Plaintiff’s efforts to prevent Defendants’ unauthorized acts, as recently as March 2015, Defendants have continued to distribute, display, offer for sale, and sell infringing products. *Id.* ¶¶ 31, 33.

In the Complaint, Plaintiff brings claims for copyright infringement (First Cause of Action); trademark counterfeiting (Second Cause of Action); trademark infringement (Third Cause of Action); false designation of origin, passing off, and unfair competition (Fourth Cause of Action); violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.* (“FDUTPA”) (Fifth Cause of Action); unfair competition (Sixth Cause of Action); and unjust enrichment (Seventh Cause of Action).

A summons was issued as to Defendants, and service was executed as to each of the Defendants on May 14, 2015. Docs. 2, 15-17. On June 19, 2015, Plaintiff sought the entry of a clerk’s default against each of the Defendants, Docs. 18-20, and on June 23, 2015, the Clerk entered default as to each of the Defendants, Docs. 21-23. The Magistrate Judge subsequently withdrew the Clerk’s entry of default as to Nancy because the docket reflected that Nancy had filed an answer to the Complaint on May 21, 2015, Doc. 24, but after all of Nancy’s purported answers had been stricken,¹ Plaintiff again moved for entry of a clerk’s default, Doc. 43. The Magistrate Judge granted Plaintiff’s request, and the Clerk entered default as to Nancy on January 4, 2016. Docs. 44, 45. Plaintiff now moves for entry of a default judgment, arguing that it is entitled to permanent injunctive relief as well as statutory damages in the amount of \$150,000 and reasonable attorneys’ fees.

II. LEGAL STANDARD

A defendant who defaults is deemed to have “admit[ted] the plaintiff’s well-pleaded allegations of fact.” *Buchanan v. Bowman*, 820 F.2d 359, 361 (11th Cir. 1987); *see also*

¹ Plaintiff moved to strike Nancy’s answer on the grounds that it was deficient and did not otherwise comply with the Federal Rules of Civil Procedure. Doc. 29. The Court granted Plaintiff’s motion with leave to submit an amended answer. Doc. 33. Nancy thereafter submitted a letter purporting to be an amended answer, Doc. 36, which Plaintiff again moved to strike, Doc. 38. The Magistrate Judge granted the motion, and again struck Nancy’s purported answer. Doc. 40.

Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975) (“The defendant, by his default, admits the plaintiff’s well-pleaded allegations of fact, is concluded on those facts by the judgment, and is barred from contesting on appeal the facts thus established.”). However, “default does not in itself warrant the court in entering a default judgment”—a court must still determine whether the factual allegations of the complaint provide a sufficient basis for the judgment entered, and “[t]he defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law.” *Nishimatsu Constr. Co.*, 515 F.2d at 1206. Similarly, a plaintiff is entitled to only those damages adequately supported by the record. *See Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538, 1544 (11th Cir. 1985).

III. DISCUSSION

A. Clerk's Entry of Default

Federal Rule of Civil Procedure 55(a) provides: “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.” A district court may enter a default judgment against a properly served defendant who fails to defend or otherwise appear pursuant to Federal Rule of Civil Procedure 55(b). *DirectTV, Inc. v. Griffin*, 290 F.Supp. 2d 1340, 1343 (M.D. Fla. 2003).

Under the federal rules, a plaintiff may serve an individual defendant by

[L]eaving a copy of [the summons and of the complaint] at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there ...

Fed. R. Civ. P. 4(e)(2)(B). A plaintiff may also serve a defendant by “following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made[.]” Fed. R. Civ. P. 4(e)(1).

Plaintiff's affidavit of service filed on May 14, 2015, shows that the process server effectuated service on Dead Man Supplies Corporation, Kevin Parker and Nancy Parker by serving Nancy Parker individually, as the spouse and co-resident of Kevin Parker², and as the registered agent for Dead Man Supplies Corporation at her business address. Doc. 15-17. Under the guidelines established in Rule 4(e), service on the Defendants was proper. The returns of service also state that specific inquiry was made of the persons served, and the individual Defendants are not on active duty with any of the armed forces of the United States. *Id.*

Under Federal Rule of Civil Procedure 12(a)(1), Defendants were required to respond to Plaintiff's complaint within twenty-one (21) days from the date of service. The federal rules require court clerks to enter a defendant's default "[w]hen service of process is properly effected, but the served party fails to respond in a timely manner...." *Kelly v. Florida*, 233 F. App'x 883, 885 (11th Cir. 2007) (citing Fed. R. Civ. P. 55(a)). Defendants Dead Man Corporation and Kevin Parker failed to respond to the complaint and have otherwise failed to appear in this action. As discussed above, Nancy Parker's responses were stricken and the Court authorized the clerk to enter a default. Doc. 44, 45. Thus, the Clerk properly entered the defaults against all of the Defendants.

B. Liability

Plaintiff has properly alleged in its Complaint, and has presented evidence in support thereof, that Defendants infringed on its Intenze Marks and at least one of its Intenze Works by willfully and knowingly purchasing, copying, manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale, and/or selling counterfeit ink. *See* Doc. 1 ¶¶ 26-38, Exhibits D-E, G-H, J. Since Plaintiff has adequately pleaded all of the elements of

² Florida Statute § 48.031(2)(a) permits substitute service "on the spouse of the person to be served at any place in the county, if the cause of action is not an adversary proceeding between the spouse and the person to be served, if the spouse requests such service, and if the spouse and person to be served are residing together in the same dwelling."

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