

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

ALAN DAVIS,

Plaintiff,

v.

**5:23-CV-675
(FJS/MJK)**

XPW WRESTLING INC.,

Defendant.

APPEARANCES

OF COUNSEL

SANDERS LAW GROUP
333 Earle Ovington Boulevard
Suite 402
Uniondale, New York 11553
Attorneys for Plaintiff

CRAIG B. SANDERS, ESQ.

XPW WRESTLING INC.
Defendant

NO APPEARANCE

SCULLIN, Senior Judge

MEMORANDUM-DECISION AND ORDER

I. BACKGROUND

A. Procedural Background

Plaintiff commenced this action after he discovered that Defendant had copied and displayed one of his copyright-protected photographs without a license or permission in violation of, among other things, 17 U.S.C. § 501. *See* Dkt. No. 15-12, Memorandum of Law, at 7. On July 21, 2023, Plaintiff filed a request for a Clerk's entry of default against Defendant, *see* Dkt. No. 7, which the Clerk entered the same day, *see* Dkt. No. 8. On October 23, 2023, Plaintiff filed the pending motion for entry of a default judgment. *See* Dkt. No. 15.

Plaintiff contends that he is entitled to a default judgment because (1) Defendant has failed to answer or otherwise appear in this action, the time for Defendant to do so has expired, and such time has not been extended by Order of the Court; and (2) the complaint sets forth sufficient factual predicate to establish a *prima facie* claim for direct copyright infringement. *See id.* Furthermore, Plaintiff states that, by defaulting or otherwise failing to appear, Defendant is deemed to have admitted all well-pleaded factual allegations in the complaint. *See id.* Therefore, Plaintiff seeks entry of a default judgment in the amount of \$20,719.50, comprised of the following amounts: (1) statutory damages in the amount of \$12,500.00; (2) costs in the amount of \$457.00; and attorney's fees in connection with the prosecution of this action in the amount of \$7,762.50. *See id.* In addition, Plaintiff seeks a permanent injunction enjoining Defendant from continuing to use Plaintiff's copyrighted material. *See id.*

B. Factual background

According to the complaint, Plaintiff is a professional photographer by trade, who is the legal and rightful owner of photographs that he licenses to online and print publications. *See* Dkt. No. 15-12, Memorandum of Law, at 9 (citing Complaint at ¶ 11; Davis Dec. at ¶ 3). Plaintiff states that he has invested significant time and money in building his photograph portfolio. *See id.* at 10 (citing Complaint at ¶ 13; Davis Dec. at ¶ 4). Plaintiff has also obtained active and valid copyright registrations from the United States Copyright Office ("USCO") that cover many of his photographs while others are the subject of pending copyright applications. *See id.* (citing Complaint at ¶ 14; Davis Dec. at ¶ 5). Plaintiff asserts that his photographs are original, creative works in which he owns protectable copyright interests. *See id.* (citing Complaint at ¶ 15; Davis Decl. at ¶ 6).

On December 16, 2018, Plaintiff authored a photograph of professional wrestling commentator Ron Niemi (the "Photograph"). *See id.* (citing Complaint at ¶¶ 16-17; Davis Dec. at ¶ 13). Plaintiff applied to register the Photograph with the USCO on or about March 11, 2019, under Application No. 1-7495355921, and the Photograph was subsequently registered under Registration No. VA 2-142-919 on March 11, 2019. *See id.* (citing Complaint at ¶ 19; Davis Dec., Exhibit 1, "Certificate of Registration").

Defendant is a professional wrestling promotion company that owns and operates a social medial account on Facebook at www.facebook.com with the name "The XPW Wrestling" ("FB Account"). *See id.* (citing Complaint at ¶ [3]). Defendant also owns and operates a social media account on Instagram at www.instagram.com with the name "thexpwwrestling" ("IG Account") and on Twitter at www.twitter.com with the name "@Thexpwwrestling" ("TW Account"). *See id.* (citing Complaint at ¶¶ 4-5 (the FB Account, IG Account, and TW Account may be hereinafter collectively referred to as the "Accounts")). According to Plaintiff, the Accounts are part of and used to advance Defendant's commercial enterprise. *See id.* (citing Complaint at ¶ 23). These Accounts are also used to advertise and promote Defendant's sponsored wrestling events as well as Defendant's associated merchandise and, upon information and belief, Defendant profits from these activities. *See id.* (citing Complaint at ¶ 25).

On October 13, 2022, Plaintiff saw his Photograph on the Accounts. *See id.* (citing Complaint at ¶ 36; Davis Dec. at ¶ 29). Defendant displayed the Photograph on FB Account at [URL:https://www.facebook.com/photo.php?fbid=562040022403542&set=pb.100057926485268.-220752000.&type=3](https://www.facebook.com/photo.php?fbid=562040022403542&set=pb.100057926485268.-220752000.&type=3) *See id.* at 11 (citing Dkt. No. 1-2; Complaint at ¶ 26; Davis Dec. at ¶ 33). On October 20, 2022, Defendant posted the Photograph to FB Account. *See id.* (citing Dkt. No. 1-2; Complaint at ¶ 27; Davis Dec. at ¶ 33).

On October 13, 2022, Defendant also posted the Photograph on TW Account. *See id.* (citing Dkt. No. 1-2; Complaint at ¶ 30; Davis Dec. at ¶ 34). On October 13, 2022, Defendant also posted the Photograph to IG Account. *See id.* (citing Dkt. No. 1-2; Complaint at ¶ 33; Davis Dec. at ¶ 35). Finally, on November 10, 2022, Defendant posted the Photograph to IG Account. *See id.* (citing Dkt. No. 1-2; Complaint at ¶ 34; Davis Dec. at ¶ 35).

Plaintiff contends that each infringing use is an exact copy of the vast majority of Plaintiff's original image, which Defendant directly copied and displayed on the Accounts. *See id.* (citing Complaint at ¶ 41; Davis Dec. at ¶ 30). Defendant did not obtain a license or other permission from Plaintiff to feature the Photograph on its Accounts. *See id.* (citing Complaint at ¶ 39; Davis Dec. at ¶ 36). Plaintiff states, on information and belief, that Defendant received a financial benefit directly attributable to the infringements. *See id.* (citing Complaint at ¶ 47). Again, on information and belief, Plaintiff asserts that the Infringement increased traffic to the Accounts and, in turn, caused Defendant to realize an increase in the revenues generated via Defendant's sponsored events and/or merchandise sales. *See id.* (citing Complaint at ¶ 48). Finally Plaintiff contends that, on information and belief, a large number of people have viewed the unlawful copies of the Photograph on the Accounts. *See id.* (citing Complaint at ¶ 49).

Plaintiff asserts that he did not authorize Defendant's use of the Photograph and did not license the right to use his Photograph to Defendant in any manner. *See id.* Notwithstanding the foregoing, Defendant arrogated to itself the right to copy, store and display that which did not belong to Defendant. *See id.* at 12. As a result of Defendant's misconduct, Plaintiff contends that he has been substantially harmed insofar as he has been deprived of his right to control the use of his Photograph and to determine the value of the same. *See id.* Plaintiff, through his counsel, notified Defendant on February 28, 2023, by electronic mail of the unlawful use of

Plaintiff's Photograph. *See id.* (citing Complaint at ¶ 37). Despite notification of its unlawful activities, however, Defendant continued to display Plaintiff's Photograph in furtherance of its commercial activities on each of the Accounts. *See id.*

II. DISCUSSION

A. Liability

By failing to answer the complaint or oppose Plaintiff's motion for entry of a default judgment, Defendant is deemed to have admitted the factual allegations in the complaint. *See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992) (finding that "a party's default is deemed to constitute a concession of all well pleaded allegations of liability").

Whether to enter a default judgment, however, is committed to the court's discretion. *See Greathouse v. JHS Sec. Inc.*, 784 F.3d 105, 116 (2d Cir. 2015) (citation omitted). "Even where a defendant has admitted all well-pleaded facts in the complaint by virtue of default, a district court 'need not agree that the alleged facts constitute a valid cause of action,' and may decline to enter a default judgment on that ground." *Sadowski v. Urbanspotlite LLC*, No. 1:22-cv-00887 (BKS/DJS), 2023 WL 2838376, *2 (N.D.N.Y. Apr. 7, 2023) (Sannes, C.J.) (quoting *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011) (quoting *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981))). In fact, "the Second Circuit has 'suggested that, prior to entering default judgment, a district court is 'required to determine whether the [plaintiff's] allegations establish [the defendant's] liability as a matter of law.'"" *Id.* (quoting *[Mickalis Pawn Shop]*, 645 F.3d at 137] (quoting *Finkel v. Romanowicz*, 577 F.3d 79, 84 (2d Cir. 2009))).

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