

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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INTREPIDUS, LLC,
a member of Seductive Approach LLC, suing
in the right of SEDUCTIVE APPROACH LLC,

Plaintiff,

-v-

No. 15-Civ-7721-LTS-HBP

GLENN J. BIVINS and ERIC MONSE,

Defendants.

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MEMORANDUM OPINION AND ORDER

In this action arising from the creation and alleged diversion of an Internet-based style and dating advice business, Plaintiff Intrepidus, LLC ("Intrepidus" or "Plaintiff"), suing as a member and on behalf of Seductive Approach LLC, asserts the following causes of action against Defendant Glenn J. Bivins ("Bivins")¹ (1) copyright infringement, (2) misappropriation, (3) conversion, (4) tortious interference, (5) declaratory judgment, (6) fraud, and (7) fraud in the inducement, in violation of both the Copyright Act and New York state law. Plaintiff asserts copyright infringement and declaratory judgment claims against Defendant Eric Monse ("Monse"). The Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1338, and 1367.

Plaintiff moves, pursuant to Federal Rule of Civil Procedure 55(b)(2), for a default judgment against Bivins and Monse ("Defendants"). Plaintiff seeks a judgment on the merits

¹ The docket and filings refer to this Defendant as, interchangeably, both Glenn Bivins and Glenn Bivens. The Court will hereinafter refer to him as "Bivins."

against Defendants as to each of its causes of action. Defendants have not opposed the instant motion.

The Court has reviewed Plaintiff's submissions carefully and, for the following reasons, the motion for default judgment is granted in part and denied in part.

BACKGROUND²

This case arises from a business transaction between Bivins and Intrepidus for the joint creation of Seductive Approach, LLC ("Seductive Approach"). Seductive Approach "is a company that specializes in personal lifestyle development and enhancement with an emphasis on confidence, fashion and personal development, and a strong emphasis on dating techniques." (Am. Compl. ¶¶40-41; Seductive Approach Operating Agreement, Plaintiff's Brief Exhibit ("Pl. Ex.") E § 3.1 ("Operating Agreement").) Bivins, a "PUA (pick up artist)", presented Brian Engelbert with a business proposal in early 2012, and Engelbert agreed to be the financial backer for the proposal through, Intrepidus, a newly created company. (Am. Compl. ¶¶42-43.) Intrepidus provided \$68,000, or 100% of the financial investment, and Bivins' contribution was to consist of his coaching expertise, ideas, intellectual property, and services. Bivins became the managing member and sole employee of the company and received an 85% ownership stake in Seductive Approach while Intrepidus received a 15% ownership stake. (Am. Compl. ¶¶44-47.)

Seductive Approach holds United States copyright registrations for the literary content of the Seductive Approach website, and for the literary works titled "Same Day Lays by

² The facts recited herein are drawn from Plaintiff's Amended Complaint ("Am. Compl.", Docket Entry No. 33), and submissions in connection with this motion practice. In light of Defendants' default, Plaintiff's well-pleaded factual allegations are deemed admitted for purposes of this motion practice. *See* Fed. R. Civ. P. 8(b)(6); *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992) ("[A] party's default is deemed to constitute a concession of all well pleaded allegations of liability.").

Glenn Pearce,” “Banter Lines by Glenn Pearce,” and “Six Biggest Fails by Glenn Pearce.” The United States Copyright Office granted the copyright registrations in February and March of 2015. (Am. Compl. ¶¶129-32; Docket Entry No. 33, Seductive Approach Copyright Registrations, Pl. Ex. N (“Copyright Registrations”).)

In or about April 2013, Engelbert approached Bivins with numerous concerns about his management of the company. (Am. Compl. ¶69.) Bivins then began creating a rival company, Attractive Approach, and converted Seductive Approach’s property for use by the new company. (Am. Compl. ¶¶77-128.) Bivins converted the Seductive Approach website into the Attractive Approach website, using Seductive Approach funds for the change and costs of the new site. (Am. Compl. ¶¶94-99.) Bivins also used Seductive Approach assets to make payments for services rendered to Attractive Approach, his unrelated Glenn Jason Hair Design Business, his unincorporated business run through www.glennpua.com, and his personal attorney. (Am. Compl. ¶¶75, 128.) Bivins admitted that he took the Seductive Approach website and materials because he believed he would ultimately resolve any dispute with Intrepidus in a settlement. (Settlement Negotiation Emails, Pl. Ex. X. (“Settlement Emails”).) Defendant Monse aided in the theft of Seductive Approach’s intellectual property by advertising promotional material, which was comprised of Seductive Approach’s intellectual property, on his website, while knowing that Bivins was stealing from Seductive Approach and Intrepidus. (Am. Compl. ¶¶113-14.)

The Attractive Approach website mirrored the Seductive Approach website and business plan in its offerings and Bivins promoted his new coaching service on websites run by Defendant Monse. (Am. Compl. ¶¶ 86-96, 123.) Bivins earned revenue from his coaching services that were promoted on the Attractive Approach website and from the sale of Seductive Approach products on Attractive Approach’s website, as well as other websites. (Am. Compl.

¶¶117-28.)

Plaintiff alleges that Bivins knowingly and intentionally made false representations during the initial negotiations for the creation of Seductive Approach. Specifically, Intrepidus alleges that Bivins falsely claimed "he would transfer the intellectual property he had previously created for the PUA industry to Seductive Approach, would implement the copyright registrations for such works listing Seductive Approach as the rightful owner, and that Bivins' previously created intellectual property, as well as the intellectual property he created while working for ... Seductive Approach would be the sole and exclusive property of Seductive Approach." (Am. Compl. ¶164.) Plaintiff also alleges that, without these inducements, "there would be no reason for Engelbert to invest his monies through Intrepidus." (Am. Compl. ¶¶ 36-38.) Plaintiff further alleges that Bivins intended that Plaintiff would rely on these false statements when entering into the Operating Agreement and that Plaintiff did rely on such statements, resulting in harm and damages to Plaintiff. (Am. Compl. ¶¶164-69, 171-77.)

Plaintiff commenced this action by the filing of a complaint on Seductive Approach's behalf against Defendants Phillip Salsbury Schloss ("Schloss"), Bivins, The Salsbury Fortress, LLC ("Salsbury Fortress"), and Monse. On December 12, 2015, Plaintiff filed an Amended Complaint. (See generally Docket Entry Nos. 1 and 33.) Defendants filed a motion to dismiss on December 29, 2015. (Docket Entry No. 40.) On March 9, 2016, the Court granted defense counsel's motion to withdraw, and ordered Defendants to each file a notice of appearance by new counsel within 60 days. (Docket Entry No. 56.) On May 31, 2016, the Court endorsed Plaintiff's notice of voluntary dismissal with prejudice as against Salsbury Fortress and Schloss in light of the parties' settlement agreement. (Docket Entry No. 60.) On that same day, the Court renewed the 60-day period by which Defendants Bivins and Monse were required to file notices of

appearance by new counsel or pro se, directing that "[f]ailure to file such notice of appearance by August 7, 2016, will result in the striking as abandoned of the pending motion to dismiss the complaint and an entry of default against Defendants who have not appeared, and authorization of default judgment motion practice." (Docket Entry No. 59.) Bivins and Monse have neither filed notices of appearance, nor made any submissions, since their former attorney withdrew.

On August 16, 2016, the Court terminated Defendants' motion to dismiss as abandoned, directed the Clerk of Court to issue a certificate of default, and authorized Plaintiff to make a motion for default judgment. (Docket Entry No. 65.) The Clerk of Court issued a certificate of default on August 17, 2016 (Docket Entry No. 66), and on August 30, 2016, Plaintiff filed this motion for default judgment. (Docket Entry No. 69.)

DISCUSSION

Default Judgment Standard

In determining whether to grant a motion for default judgment, courts within this district first consider three factors: "(1) whether the defendant's default was willful; (2) whether defendant has a meritorious defense to plaintiff's claims; and (3) the level of prejudice the non-defaulting party would suffer as a result of the denial of the motion for default judgment."

Indymac Bank, F.S.B. v. National Settlement Agency, Inc., 2007 WL 4468652, at *1 (S.D.N.Y. Dec. 20, 2007) (internal citation omitted); see also Guggenheim Capital, LLC v. Birnbaum, 722 F.3d 444, 455 (2d Cir. 2013) (applying these factors in review of lower court grant of a default judgment). The Court finds that all three of the foregoing factors weigh in Intrepidus' favor.

Defendants' failure to make an appearance after their previous counsel withdrew and their failure to respond to Intrepidus' Motion for Default Judgment are indicative of willful

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