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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BOSTIK, INC.,) Case No. 12-4021 SC
)
Plaintiff,) ORDER DENYING APPLICATION
) FOR DEFAULT JUDGMENT
v.)
)
J.E. HIGGINS LUMBER CO.; GOLDEN)
STATE FLOORING, INC.; and DOES 1-)
50, inclusive,)
)
Defendants.)
)

I. INTRODUCTION

Now before the court is Plaintiff Bostik, Inc.'s ("Plaintiff") Application for Default Judgment against Defendant J.E. Higgins Lumber Co. ("Defendant"). ECF No. 27 ("Appl."). Defendant has neither appeared in this action nor opposed Plaintiff's Application. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument. As discussed below, Plaintiff's Application is DENIED without prejudice.

II. BACKGROUND

Plaintiff is a manufacturer and supplier of industrial adhesives, among other things. Defendant, a hardwood flooring

1 company, purchased adhesive products from Plaintiff in twenty-one
2 transactions, each enshrined in the parties' purchase orders and
3 invoices (collectively, the "Agreements"). ECF No. 1 ("Compl.") ¶¶
4 7-10; ECF No. 1-2 ("Thompson Decl."). The Agreements are governed
5 by Plaintiff's Terms and Conditions of Sale ("Terms"). Thompson
6 Decl. Ex. B. Plaintiff alleges that it performed per the
7 Agreements, but Defendant never paid. Compl. ¶¶ 7-10. Plaintiff
8 therefore sued Defendant for breach of contract. Compl. ¶¶ 11-15.

9 Plaintiff served Defendant with the Summons and Complaint on
10 August 1, 2012. ECF No. 6-1 (Proof of Service) ("POS"). Defendant
11 never responded or appeared in this action. The Clerk of Court
12 entered default against Defendant on October 5, 2012, ECF No. 21,
13 and Plaintiff served the Clerk's notice of entry of default on
14 Defendant that same day. ECF No. 22. On October 17, 2012,
15 Plaintiff served Defendant with a copy of the present Application
16 and other papers. ECF No. 27-5. Now Plaintiff seeks default
17 judgment for a total of \$680,593.64, comprised of: (1) \$590,946.27
18 in unpaid contractual fees under the Agreements; (2) \$70,913.55 in
19 contractual interest, based on the Terms' requirement that
20 Defendant pay the maximum allowable interest under Wisconsin law on
21 unpaid contractual fees; and (3) \$18,733.82 in attorneys' fees,
22 costs, and expenses, per the Terms' requirement that Defendant pay
23 Plaintiff's attorneys' fees and other costs if Plaintiff is forced
24 to recover unpaid fees from Defendant. Appl. at 2-3. Defendant
25 has not opposed Plaintiff's Application.

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1 **III. LEGAL STANDARD**

2 Under Federal Rule of Civil Procedure 55(b)(2), a party may
3 apply to the Court for entry of default judgment after the Clerk of
4 Court has entered default. The Court's decision to enter default
5 judgment is discretionary. Aldabe v. Aldabe, 616 F.2d 1089, 1092
6 (9th Cir. 1980). As a preliminary matter, the Court must "assess
7 the adequacy of the service of process on the party against whom
8 default judgment is requested." Bd. of Trs. of the N. Cal. Sheet
9 Metal Workers v. Peters, No. C 00-0395 VRW, 2000 U.S. Dist. LEXIS
10 19065, at *2 (N.D. Cal. Jan. 2, 2001).

11 If the Court determines that service was sufficient, its
12 decision to enter default judgment may be guided by the following
13 factors: (1) the possibility of prejudice to the plaintiff; (2) the
14 merits of the plaintiff's substantive claim; (3) the sufficiency of
15 the complaint; (4) the sum of money at stake in the action; (5) the
16 possibility of a dispute concerning material facts; (6) whether the
17 default was due to excusable neglect; and (7) the strong policy
18 underlying the Federal Rules of Civil Procedure favoring decisions
19 on the merits. Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir.
20 1986). When the Court assesses the Eitel factors, all well-pleaded
21 allegations regarding liability are taken as true, except with
22 respect to the damages requested. Fair Hous. of Marin v. Combs,
23 285 F.3d 899, 906 (9th Cir. 2002).

24
25 **IV. DISCUSSION**

26 **A. Adequacy of Service**

27 Federal Rule of Civil Procedure 4(e) permits service by any
28 means authorized by the law of the state in which the district

1 court sits. See Fed. R. Civ. P. 4(e)(1). Rule 4(h)(1)(A)
2 authorizes service upon a corporation "in the manner prescribed by
3 Rule 4(e)(1) for serving an individual." Under California law, a
4 corporation may be served by either: (1) personal delivery of a
5 copy of the summons and complaint to an officer, general manager,
6 or a person authorized by the corporation to receive service of
7 process; or (2) "leaving a copy of the summons and complaint during
8 usual office hours in his or her office . . . with the person who
9 is apparently in charge thereof" and then by mailing the papers to
10 the person to be served at the office address. Cal. Code Civ.
11 Proc. §§ 415.20(a), 416.10(b). This method of service is deemed
12 complete on the tenth day after mailing. Id.

13 On August 1, 2012, Plaintiff's process server delivered to
14 Defendant's offices copies of the Summons and Complaint, addressed
15 to Defendant's registered agent for service of process, and left
16 them with "Brad Ibiadt," the "Front Desk Person," who was informed
17 of the nature of the papers. POS at 1. On August 2, 2012,
18 Plaintiff mailed copies of the service papers to Defendant's
19 registered agent in compliance with the California Code of Civil
20 Procedure section 415.20. Id. at 2. There is no indication that
21 Mr. Ibiadt was not "apparently in charge" of the office. The Court
22 accordingly finds that Plaintiff adequately served Defendant as of
23 August 12, 2012, the tenth day after Plaintiff mailed the service
24 papers to Defendant.

25 **B. Eitel Factors**

26 Since service was proper, the Court turns to the Eitel factors
27 to determine whether default judgment is appropriate.

28 ///

1 **1. Prejudice Against Plaintiff**

2 The first factor considers the possibility of prejudice
3 against the plaintiff if default judgment is not entered. The
4 Court finds that, because Plaintiff may be without recourse for
5 recovery if default judgment is not entered, this factor weighs in
6 favor of default judgment. See PepsiCo, Inc. v. California Sec.
7 Cans, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002).

8 **2. Plaintiff's Allegations Must State a Claim**

9 The second and third Eitel factors require that a plaintiff's
10 allegations state a claim upon which it can recover. In the
11 instant action, Plaintiff claims that Defendant breached the
12 Agreements by failing to pay after Plaintiff performed.
13 Plaintiff's allegations are sufficient to state a claim for breach
14 of contract. Accordingly, the Court finds that these factors weigh
15 in favor of default judgment.

16 **3. The Amount of Money at Stake**

17 As to the fourth Eitel factor, the Court must consider "the
18 amount of money at stake in relation to the seriousness of
19 defendant's conduct." Bd. of Trs. of the N. Cal. Sheet Metal
20 Workers, No. C 00-0395 VW, 2000 U.S. Dist. LEXIS 19065, at *4-5
21 (N.D. Cal. Dec. 29, 2000). "The Court considers Plaintiff's
22 declarations, calculations, and other documentation of damages in
23 determining if the amount at stake is reasonable." Truong Giang
24 Corp. v. Twinstar Tea Corp., No. 06-CV-03594, 2007 WL 1545173, at
25 *12 (N.D. Cal. May 29, 2007).

26 In its Application, Plaintiff seeks a total of \$680,593.64:
27 \$590,946.27 in contractual fees, \$70,913.55 in interest, and
28 \$18,733.82 in attorneys' fees, costs, and expenses. Appl. at 2-3.

1 While this is a significant amount, the parties are corporations in
2 a commercial transaction, and the contractual fees and interest
3 accumulated over a relatively long period of time. Also, the
4 contractual fees at issue here are based on Defendant's refusal or
5 failure to pay the amounts explicitly required of it per the
6 Agreements, and Plaintiff has a clear contractual basis for
7 requesting interest and attorneys' fees and costs. In other words,
8 Plaintiff has sources of proof for the amount it requests.

9 However, as discussed below, Plaintiff fails to "prove up" the
10 amount of money it seeks in judgment despite its sources of proof
11 because of several significant mistakes in its Application.
12 Granting the requested amount under these circumstances would be
13 unreasonable and unfair.

14 **4. Likelihood of Dispute Over Material Facts**

15 With respect to the fifth Eitel factor, the material facts of
16 the instant case are not reasonably likely to be subject to
17 dispute. Plaintiff has pled factual allegations and provided
18 declarations supporting its claims. Accordingly, since the Court
19 may assume the truth of the facts pled in the Complaint (except
20 with respect to damages) upon default, there is no likelihood that
21 any genuine issue of material fact exists here. See Geddes v.
22 United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977). Defendant's
23 failure to appear at any point in this case further supports this
24 conclusion. Accordingly, this factor weighs in favor of entry of
25 default judgment.

26 **5. Excusable Neglect**

27 For the sixth Eitel factor, there is no support for finding
28 that Defendant's default is due to excusable neglect. Defendant

1 was served with the Complaint and Summons in this action over five
2 months ago and has yet to enter an appearance. Plaintiffs also
3 served Defendant with their Application. In such circumstances,
4 default cannot be attributed to excusable neglect. See Shanghai
5 Automation Instrument Co. v. Kuei, 194 F. Supp. 2d 995, 1005 (N.D.
6 Cal. 2001). This factor supports entry of default judgment.

7 **6. Policy Favoring Decision on the Merits**

8 "Cases should be decided upon their merits whenever
9 reasonably possible." Eitel, 782 F.2d at 1472. However, this
10 policy is not dispositive, and "Defendant's failure to answer
11 Plaintiff['s] Complaint makes a decision on the merits impractical,
12 if not impossible." PepsiCo, 238 F. Supp. 2d at 11. Termination
13 of a case before hearing the merits is allowed when a defendant
14 fails to defend an action. Id. Therefore, in this case, this
15 factor does not weigh against default judgment.

16 **7. Summary of Eitel Factors**

17 The Eitel factors favor entry of default judgment. However,
18 as explained more fully below, the Court finds that Plaintiff's
19 failure to provide adequate proof of the amount requested outweighs
20 mechanical application of the Eitel factors in this case.

21
22 **B. DAMAGES**

23 In granting default judgment, a court can award only up to the
24 amount prayed for by a plaintiff in its complaint. Fed. R. Civ.
25 Pro. 54(c). A demand for relief must be specific, under FRCP
26 8(a)(3), and plaintiff must "prove up" the amount of damages, fees,
27 and costs it requests by providing admissible evidence in the form
28 of clear declarations, calculations, witness testimony, or other

1 documentation supporting its request. Orange Co. Elec. Ind. Health
2 & Welfare Trust Fund v. Moore Elec. Contracting, Inc., No. 11-CV-
3 00942-LHK, 2012 WL 1623236, at *2 (N.D. Cal. May 8, 2012); Truong
4 Giang, 2007 WL 1545173, at *13. Plaintiff has failed to prove up
5 its damages.

6 First, Plaintiff requests \$590,946.27 in unpaid contractual
7 fees, based on the amounts provided in the Agreements. Appl. at 3.
8 However, the amounts identified in Plaintiff's supporting
9 documentation total \$591,151.11, not \$590,946.27. See Thompson
10 Decl. ¶¶ 3(a)-(u); id. Ex. A. This discrepancy makes Plaintiff's
11 calculations impossible to accept, because it is not clear whether
12 Plaintiff has provided incorrect dollar amounts via the Agreements,
13 made a mistake of addition in its Application, or introduced some
14 other kind of error. Plaintiff's lack of clarity here amounts to a
15 failure to prove up damages.

16 Second, Plaintiff's incorrect calculation of unpaid fees
17 suggests that its calculation of contractual interest is also
18 wrong. In any event, Plaintiff did not explain how it calculated
19 interest per Wisconsin Statute § 138.05, the statute that governs
20 interest Defendant owes on its unpaid fees. Appl. at 3; Thompson
21 Decl. Ex. B at #3. Without a correct calculation of fees or an
22 explanation of how Plaintiff applied the Wisconsin Statute, the
23 Court cannot be sure that \$70,913.55 is the proper amount of
24 interest on Defendant's unpaid fees.

25 Third, Plaintiff requests \$18,733.82 in attorneys' fees and
26 costs. Appl. at 3. Plaintiff's justification for this is a bare
27 assertion that it has incurred fees of \$18,115 and costs of \$618.82
28 during its pursuit of its breach of contract claim. Appl. at 2-3;

1 Thompson Decl. ¶ 8. However, Plaintiff does not provide any
2 explanation of these amounts, such as its counsel's hourly rates,
3 counsel's time spent working on the matter, or any other breakdown
4 of costs. Plaintiff must prove to the Court that it is owed the
5 amount it claims.¹

6 The Court therefore finds that Plaintiff has failed to prove
7 up the amount of damages it requests, despite having an otherwise
8 favorable case for default judgment. However, Plaintiff is not
9 precluded from filing another application for default judgment that
10 provides adequate support for the relief it has requested, as
11 discussed in this Order.

12

13 **VI. CONCLUSION**

14 For the reasons discussed above, the Court DENIES without
15 prejudice the Application for Default Judgment filed by Plaintiff
16 Bostik, Inc., against Defendant J.E. Higgins Lumber Company.
17 Plaintiff may submit a revised application for default judgment
18 addressing the issues discussed above within thirty (30) days of
19 the signature date of this Order. Failure to do so will result in
20 dismissal of this action with prejudice.

21

22 IT IS SO ORDERED.

23

24 Dated: January ____, 2013

UNITED STATES DISTRICT JUDGE

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28 ¹ Plaintiff cannot, however, reassert fees for supplemental
briefing on this issue. Defendant should not have to pay for
Plaintiff's errors in filing a motion.