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

ZANA BRISKI,
Plaintiff,

No. C 17-02675 WHA

v.

DOROTHY HERSEY,
Defendant.

**ORDER RE MOTION FOR
ENTRY OF DEFAULT
JUDGMENT**

INTRODUCTION

Following entry of default, plaintiff moves for default judgment. To the extent stated below, her motion is **GRANTED**.

STATEMENT

Plaintiff Zana Briski is a professional artist and photographer in New York. In October 2016, she consigned for sale eleven of her photographs and one photograph by fellow artist Chuck Kelton to defendant Dorothy Hersey, an art dealer in Menlo Park. In the consignment contract, the parties agreed that Briski's artwork should be priced at \$164,000 in total. Also pursuant to the contract, Hersey agreed to assume full responsibility for the photographs until they were either sold, or returned to Briski. This included a provision that the photographs would be handled "according to recognized art care and preservation standards" (Dkt. Nos. 29 ¶¶ 1, 4-6; 29-1 at 5).

1 In January 2017, the art hadn't sold. Hersey agreed, via text message, that if it was not
2 sold by the end of February, she would return the work to Briski. February ended without any
3 sale. Hersey nevertheless failed to return the photographs. Briski learned that Hersey had
4 arranged to eventually ship the artwork with a shipping service that Briski found to be
5 unacceptable because of its lack of experience and expertise handling fine art. Briski objected
6 to the use of the shipper, and, after being unable to agree on other arrangements, scheduled what
7 she considered to be a qualified shipper to pick up the art at Briski's own expense. In May
8 2017, shortly before the pickup, Briski filed this lawsuit against Hersey for breach of contract
9 and conversion (Dkt. Nos. 29 ¶¶ 11–12, 14–17; 29-5).

10 After learning of this lawsuit, Hersey refused to return the photographs, telling Briski
11 “[t]he artwork is not leaving now.” Hersey, however, failed to respond to Briski's suit, and on
12 June 9, Briski moved for default. The clerk entered default on June 15 (Dkt. Nos. 11, 12).

13 On June 23, Briski learned that Hersey had been evicted from her home where the
14 artwork had been stored and was in a contentious legal battle with her former landlord. Briski
15 moved herein for provisional relief seeking the immediate return of her artwork. After
16 requiring service on Hersey and allowing her time to respond, the Court held a hearing on
17 Briski's motion. Hersey did not appear or submit any opposition, and after consideration of the
18 merits, an order granted Briski a preliminary injunction requiring Hersey to return Briski's
19 photographs by July 14 (Dkt. No. 15-2 at 21, 19, 21, 22, 29 ¶¶ 19–20).

20 On July 7, Briski received a telephone call from Kate Powers, an art gallery owner in
21 Menlo Park, who informed Briski that she had encountered Hersey standing on the street after
22 having been evicted from her home. At the time of this encounter, Hersey had Briski's
23 photographs with her, so Powers offered to store the photographs at her gallery for the time
24 being. Powers took five of the photographs back to her studio where she cleaned and wrapped
25 them. When Powers learned, through a mutual friend, that the photographs were the subject of
26 a lawsuit, she contacted Briski to inform her that she had taken possession of them and would
27 arrange for their return to Briski. On July 14, Briski picked up the five photographs from
28 Powers. On July 25, she picked up the remaining works from Hersey (Dkt. Nos. 29 ¶¶ 21–24;

1 29-9 at 2–5).

2 Briski has submitted a declaration stating that when she retrieved her photographs, the
3 frames of each of her eleven pieces were damaged beyond repair. Because the photographs
4 “once fit to the frames cannot be taken out and resold in new frames,” Briski states that
5 “Irreparable damage to the frame is irreparable damage to the work.” Accordingly, she declares
6 that “The artwork was rendered unsellable by Ms. Hersey’s mistreatment.” In support of her
7 declaration, she includes photographs of some of the artwork (though it is not clear how many
8 of her works, since most of the photographs are close-ups of portions of the frames), which
9 show minor damage to the frames (Dkt. Nos. 29 ¶¶ 22, 25; 29-10; 29-12).¹

10 Briski now seeks entry of default judgment and damages in the total amount of
11 \$303,602.59. This consists of the full value of all of her photographs based upon the agreed-
12 upon retail sales price included in the consignment agreement (\$164,000), the cost of crating
13 and shipping her artwork to California and back to New York (\$7,857.79), emotional distress
14 (\$100,000), punitive damages (\$30,000), and costs incurred prosecuting this action and
15 attempting to serve Hersey (\$1,744.80) (Dkt. Nos. 28 at 7–9).

16 ANALYSIS

17 Under FRCP 55(b)(2), a plaintiff can apply to the district court for a default judgment
18 against a defendant that has failed to otherwise plead or defend against the action. Default
19 judgments are generally disfavored as “cases should be decided upon their merits whenever
20 reasonably possible.” A district court must consider the following factors when deciding
21 whether or not to use its discretion in granting a motion for default judgment: (i) the possibility
22 of prejudice to the plaintiff; (ii) the merits of plaintiff’s substantive claims; (iii) the sufficiency
23 of the complaint; (iv) the sum of money at stake in the action; (v) the possibility of a dispute
24 concerning material facts; (vi) whether the default was due to excusable neglect; and (vii) the
25 strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.
26 *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir.1986) (citation omitted). Here, these factors

27
28 ¹ Briski does not explain *why* the photographs cannot be taken out of the frames and resold in new frames.

1 favor entry of default judgement against defendant.

2 **1. MERITS AND SUFFICIENCY OF THE COMPLAINT.**

3 With respect to determining liability and entry of default judgment, the general rule is
4 that well-pleaded allegations in the complaint are deemed true, except for the amount of
5 damages. *Fair Housing of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir.2002). Consequently,
6 this order finds that the *Eitel* factors two, three, and five weigh in favor of the entry of default
7 judgment against Hersey.

8 Under California law, to prevail on a breach of contract claim, a plaintiff must show:
9 (1) the existence of a contract, (2) performance by the plaintiff, (3) a breach by the defendant,
10 and (4) damages. *See Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1399
11 (1990). To prevail on a conversion claim, a plaintiff must show (1) the plaintiff's ownership or
12 right to possession of the property at the time of conversion, (2) the defendant's conversion by a
13 wrongful act or disposition of property rights, and (3) damages. *Mindys Cosmetics, Inc. v.*
14 *Dakar*, 611 F.3d 590, 601 (9th Cir. 2010) (internal quotation omitted).

15 Plaintiff's complaint establishes each element of each claim. In short, in October 2016,
16 the parties entered into a consignment agreement providing that Hersey would assume full
17 responsibility for the artwork until sold or returned to Briski (Compl. ¶¶ 9–10; Dkt. No. 21-1).
18 In January 2017, they agreed that Hersey would return all unsold artwork by the end of
19 February 2017 (Compl. ¶ 12; Dkt. No. 29-2). Hersey failed to return the artwork at the agreed
20 upon date and continued to refuse to return it until the July order (Compl. ¶¶ 13-14, 21). When
21 she did return the artwork, it was damaged and Briski had to pay for the shipping and handling
22 in contravention of their contract (Dkt. No. 28 at 3–4).

23 **2. THE POSSIBILITY OF DISPUTE OF MATERIAL FACTS AND EXCUSABLE**
24 **NEGLECT.**

25 Because Hersey has failed to appear or submit any opposition to Briski's motion, the
26 factual allegations presented by Briski are taken as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826
27 F.2d 915, 917 (9th Cir. 1987). Moreover, in the correspondence Briski attached to her motion
28 for preliminary injunction, Hersey admits that she was obligated to return the artwork (Dkt. 16-
3 at 6–7). There is little possibility of any dispute of material facts regarding this obligation.

1 Additionally, Hersey has neglected this case. Hersey was first served four and a half
2 months ago (Dkt. No. 10). She took no action, and the clerk entered default. Briski then served
3 Hersey with a motion for a temporary restraining order (converted into a motion for preliminary
4 injunction) in late June, and Hersey failed to respond to that motion or appear at the hearing
5 (Dkt. No. 20, 21). On September 28, Briski again served her with notice of a hearing on default
6 judgment, and Hersey has again failed to submit any opposition or appear in this action.

7 Although federal policy favors decisions on the merits, the circumstances surrounding
8 this case indicate that default judgment is proper.

9 **3. DAMAGES.**

10 For the purposes of default judgment, a court does not accept allegations relating to
11 damages as true but must make an independent evaluation of claimed damages. *TeleVideo Sys.*,
12 826 F.2d at 917-18. Here, Briski seeks \$303,602.59 in damages; however, much of what she
13 seeks is not supported by the facts or relevant law.

14 *First*, she seeks \$164,000 for the artwork that has since been returned to her. This
15 represents the full retail sales price of the work (*see* Dkt. No. 29-1). Briski seeks this amount
16 because all eleven of her photographs were allegedly irreparably damaged while in Hersey’s
17 possession (Dkt. 29 ¶¶ 22, 25). Though Briski admits that only the frames were damaged, she
18 states that the photographs “once fit to the frames cannot be taken out and resold in new
19 frames,” and therefore “[i]rreparable damage to the frame is irreparable damage to the work”
20 (*ibid.*). Briski has not explained why the frames cannot be replaced or repaired at a cost of less
21 than the total estimated value of her paintings. Nor is her assumption that the artwork is now
22 worthless — due to what appears to be minor damage to the frames (*see* Dkt. Nos. 29-10, 29-
23 12) — reasonable. Briski has not submitted any evidence, aside from her own pithy say-so,
24 supporting this dramatic decrease in the value of the art.

25 Moreover, the agreed-on retail sales price does not translate to value. We must
26 remember that no one bought the works at that price. It was merely what the two agreed they
27 would try to get. And, even if the full price had been fetched, the dealer would have kept
28 twenty five percent of the sale. Via a default, Briski wants to reap the full sales price (without

1 deduction for commission) *and* wants to keep the works. The Court will not be a party to such
2 an inequity.

3 Ordinarily, the measure of damages for harm to personal property is either the
4 diminution in value or the reasonable cost of repair. *Pacific Gas & Elec. Co. v. Mounteer*, 66
5 Cal. App. 3d 809, 812 (1977). Briski’s request for the full value of her artwork is unreasonable,
6 and would result in an inequitable windfall. Accordingly, given Briski’s failure to provide
7 proof of actual damages, this order awards one dollar in nominal damages for the artwork,
8 which has now all been returned to her.

9 *Second*, Briski seeks \$100,000 for emotional distress suffered as a result of being unable
10 to secure the return of her artwork, and, upon retrieving it finding it was irreparably damaged.
11 Except in very narrow circumstances not present here, emotional distress damages are not
12 recoverable in a breach of contract action. *Erlich v. Menezes*, 21 Cal. 4th 543 (1999).
13 Emotional distress damages are, however, available as a remedy for conversion. *Gonzales v.*
14 *Pers. Storage, Inc.*, 56 Cal. App. 4th 464, 477 (1997). Medical evidence is not required to
15 establish emotional distress damages, and such damages may be established by testimony or
16 inferred from the circumstances. *Johnson v. Hale*, 940 F.2d 1192, 1193 (9th Cir. 1991).

17 Here, Briski has not made a strong showing to support the damages claimed. She cites
18 *Hernandez v. Madrigal*, No. CIV. S-09-0413 MCE, 2011 WL 6936364, at *3 (E.D. Cal. Dec.
19 30, 2011) (Magistrate Judge Gregory Hollows), as a supposedly comparable case, but there the
20 defendant lost all equity in his property due to a fraudulent loan scheme, spent four years of
21 sleepless nights, and had such sustained stress that it resulted in persistent, severe stomach
22 pains. In *Hernandez*, the court noted that awards for emotional damages of the this type span a
23 wide range, from \$5,000 to \$125,000, and ultimately awarded the plaintiff \$75,000. In contrast
24 to *Hernandez*, Briski’s complaint covers a period of only five months. During this time, she
25 declares she was unable to sell her photographs, which put financial strain on her, and that she
26 suffered from a variety of anxiety-related symptoms including migraines, depression, and
27 inability to sleep (Dkt. No. 28 at 8). Given the limited time frame of her distress, and the fact
28 that she was able to recover her artwork, an award of \$5,000, the low end of the wide range

1 cited by Briski, is all that is warranted.

2 *Third*, Briski seeks \$30,000 in punitive damages. Under California law, punitive
3 damages are appropriate where “the defendant's acts are reprehensible, fraudulent or in blatant
4 violation of law or policy.” *Tomaselli v. Transamerica Ins. Co.*, 25 Cal.App.4th 1269, 1287, 31
5 Cal.Rptr.2d 433 (1994); see also Cal. Civ.Code § 3294(a). For punitive damages to be awarded,
6 the plaintiff must establish by clear and convincing evidence that the defendant is guilty of
7 fraud, oppression, or malice. *Henry v. Lehman Commercial Paper, Inc.*, 471 F.3d 977, 998 (9th
8 Cir. 2006). Here, Briski has failed to make such a showing. This instead appears to be a
9 garden-variety contract dispute, in which Briski is entitled to actual damages, but no more.

10 *Fourth*, Briski seeks \$7,857.79 for the cost of packaging and shipping her artwork to
11 California, and then back to New York. Pursuant to her agreement with Hersey, Hersey was
12 responsible for all shipping and crating expenses (Dkt. No. 29-1 at 5). Briski spent \$3,412.33
13 shipping her art from New York to California (Dkt. No. 29 ¶ 8; Exh. 3). She then spent
14 \$1,055.46 to have her photographs recovered from Powers shipped to a storage facility and
15 another \$3,390 to have all of her photographs shipped back to New York, totaling \$7,857.79
16 (Dkt. No. 29 ¶¶ 26–27; Exhs.13–14). She is entitled to the full amount of these costs.

17 *Fifth* and finally, Briski seeks \$1,744.80 in costs incurred prosecuting this action and
18 attempting to serve Hersey. Briski is entitled to recover the full amount of these costs.

19 **CONCLUSION**

20 For the foregoing reasons and to the extent stated herein, Briski’s application for default
21 judgment is **GRANTED**. **FINAL JUDGMENT IS HEREBY ENTERED** in favor of plaintiff Zana
22 Briski, and against defendant Dorothy Hersey. Defendant is ordered to pay \$14,602.59 in
23 damages, representing shipping and crating costs, emotional distress damages, and court costs.
24 The Clerk **SHALL CLOSE THE FILE**.

25
26 **IT IS SO ORDERED.**

27 Dated: October 5, 2017.

28 

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE