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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MEYER, SUOZZI, ENGLISH & KLEIN, P.C., Plaintiff, v. **MATHEW K. HIGBEE, Esq., NICK YOUNGSON, RM MEDIA, LTD., & HIGBEE & ASSOCIATES,** Defendants.	Case No. 2:18-cv-03353-ADS-ARL **DEFENDANTS NICK YOUNGSON AND RM MEDIA LTD. MEMORANDUM OF LAW IN SUPPORT OF MOTION/CROSS-MOTION TO VACATE DEFAULT PURSUANT TO F.R.C.P. 55(C) AND TO QUASH SERVICE OF PROCESS OR OTHERWISE DISMISS ACTION**

Defendants NICK YOUNGSON and RM MEDIA, LTD. [hereinafter "UK Defendants"] respectfully submit this Memorandum of Law in support of their motion/cross-motion to vacate the Certificate of Default entered on February 20, 2019, pursuant to F.R.C.P. 55(c), and to quash service of process or otherwise dismiss the action. By making this limited appearance, the UK Defendants are not waiving their defenses under F.R.C.P. 12(b) or otherwise appearing in the action.

INTRODUCTION

Plaintiff Meyer, Suozzi, English & Klein, P.C. [hereinafter "Plaintiff"] is a large law firm based in New York with four office locations and dozens of attorneys. On December 26, 2017,

Plaintiff downloaded a protected image for use on its law firm website without complying with the licensing conditions, which it acknowledges in its complaint. *See* Exhibit C at ¶¶ 18-28. The original image at issue is of a computer tablet bearing the words "burden of proof" [hereinafter the "Copyrighted Work"], which was an image arranged and photographed by Defendant Nick Youngson. *See* Exhibit E. Attached hereto as Exhibit F is a copy of the post on Plaintiff's website featuring the Copyrighted Work and showing that Plaintiff did not comply with the express attribution requirement necessary to qualify for a License. *See* Youngson Declaration at ¶¶ 9-10.

RM Media Ltd. is the owner of the Copyrighted Work registered with the United States Copyright Office under registration number VAu 1-248-878, with an effective registration date of June 10, 2016. *See* Exhibit G. Ownership of the Copyrighted Work was transferred from Nick Youngson to RM Media, Ltd. on November 23, 2016. *See* Exhibit H. RM Media is currently the sole rights holder to the Copyrighted Work. *See* Youngson Declaration at ¶¶ 10-11.

Shortly after learning of the copyright infringement, RM retained Higbee & Associates [hereinafter "Higbee"] to send correspondence to Plaintiff regarding its unlicensed use of the Copyrighted Work. Higbee is but one of several U.S. law firms used by RM to enforce its copyrights. In response to the correspondence, Plaintiff acknowledged that it had used the copyrighted image without license or attribution, but refused to resolve the dispute. *See* Exhibit C. Instead, on June 8, 2018, Plaintiff filed the current action against the UK Defendants, as well as Higbee and its principal, Mathew K. Higbee. *See* Exhibit C; Youngson Declaration at ¶¶ 13-15.

In its Complaint, Plaintiff seeks a declaratory judgment that Plaintiff never committed any copyright infringements in connection with its use of RM Media's Copyrighted Work, and a declaratory judgment insulating it from any claims for breach of contract based on its use(s) of

the Copyrighted Work. Plaintiff also alleges a supplemental state claim under Section 349 of New York's General Business Law, which is a consumer protection statute that applies only to those "engaged in the sale of consumer goods and services" within New York State, and requires that specific injury and damages be alleged. Neither UK Defendant has any presence in the State of New York nor engages in business practices in New York or elsewhere directed at consumers; nor has Plaintiff alleged any injury or damages as required to bring a private cause of action under the Statute. *See* Youngson Declaration at ¶¶ 16-19.

Most importantly, as stated *infra*, neither UK Defendant was served with the Summons and Complaint in this action, despite each having an address officially registered with the UK Companies House for exactly that purpose (which is not the address that was allegedly used). Nor was service of process attempted during the time prescribed by English law, and thus, the alleged attempts at service do not comply with the Rules for service of process under the Hague Convention; do not comply with Part 6.8(a) or Part 7.5 of the Civil Procedure Rules for England and Wales ["CPR"]; and do not comply with the Due Process requirements of Constitutions of the United States or the State of New York or with the Federal Rules of Civil Procedure and New York State "Long-Arm" Statute. *See* Youngson Declaration at ¶¶ 21-36.

Because they were never served, the UK Defendants did not answer or otherwise appear in the action. A Certificate of Default was entered by the Clerk of the Court, on February 20, 2019. See Exhibit A. Plaintiff subsequently filed a Motion for Default Judgment, which is pending before Magistrate Lindsey. See Exhibit B. For the reasons set forth below, the Court should vacate the Default pursuant to F.R.C.P. 55(a) and quash service of process or otherwise dismiss the complaint.

STANDARD OF REVIEW ON A MOTION TO VACATE A DEFAULT UNDER 55(C)

Where there has been a Certificate of Default entered by the Clerk of the Court under Rule 55(a) but no but no default judgment, a defendant may move to set aside the Default under Rule 55(c) for "good cause". F.R.C.P. 55(c). The "good cause" standard under Rule 55(c) is more lenient then the "excusable neglect" standard required to set aside a default judgment under Rule 60(b). Austin Energy, LLC v. Eco Lumens, LLC, No. 11-CV-5749 (E.D.N.Y. 2013) (ADS)(ARL); 2013 WL 6835192 at *2-3 (vacating default and default *judgment* without further inquiry where there was no proper service). When determining whether to set aside a default under 55(c), the court must consider three factors: 1) the willfulness of the default; 2) the existence of a meritorious defense; and 3) prejudice to the non-defaulting party should relief be granted. Austin Energy, 2013 WL 6835192 at *2) (citing *Meeham v. Snow*, 652 F.2d 274, 276. (2d Cir. 1981). Any doubt as to whether the default should be granted must be resolved in favor of the defaulting party. Goldstein v. Urgo Eleuthera Hotels, Ltd., No. CV-14-6395 (E.D.N.Y. 2016) (ADS)(ARL); 2016 WL 1019394 at *2 (citing *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993).

However, as discussed below, this Court has held that when considering a motion to vacate a default under 55(c) or a default judgment under 60(b) where there has been no proper service of the complaint, "the district court need not resort to an analysis of the three factors." Austin Energy, 2013 WL 6835192 at *3 (referring to the three factors used to decide to vacate a default *judgment* and vacating the DJ without further analysis). Where service of process is insufficient, the court lacks jurisdiction over the defendant and the default against it is void and must be set aside. Austin Energy, 2013 WL 6835192 at *3. The Court may either dismiss the action or retain the case but

quash the service. Fallman v. Hotel Insider, Ltd., 14-CV-10140 (S.D.N.Y. 2016); 2016 WL 5875031 at *4 (citing *Zapata v. City of New York*, 502 F.3d 192, 196-97 (2d Cir. 2007).

ARGUMENT

A. THE COURT SHOULD GRANT DEFENDANTS' MOTION TO VACATE THE DEFAULT UNDER F.R.C.P. 55(C) AS THE UK DEFENDANTS WERE NEVER SERVED WITH THE COMPLAINT, HAVE MERITORIOUS DEFENSES TO THE ACTION AND PLAINTIFF WILL NOT BE PREJUDICED.

As set forth below, the default against defendants should be vacated and the matter dismissed or service of process otherwise quashed as the UK Defendants were never served with the Summons and Complaint, despite each having an address officially registered with the UK Companies House for exactly that purpose (which is not the address that was allegedly used). Nor was service of process attempted during the time prescribed by English law, and thus, the alleged attempts at service do not comply with the Rules for service of process under the Hague Convention; do not comply with Part 6.8(a) or Part 7.5 of the Civil Procedure Rules for England and Wales ["CPR"]; and do not comply with the Due Process requirements of Constitutions of the United States or the State of New York or with the Federal Rules of Civil Procedure and New York State "Long-Arm" Statute.

In addition, the UK Defendants have meritorious defenses to this action in addition to the numerous jurisdictional issues. Plaintiff acknowledges in its Complaint that it infringed upon RM's copyright. In addition, the Complaint fails to state a Federal claim upon which relief or allege any actual case of controversy with respect to Mr. Youngson, as he does not own the Copyrighted Work at issue. With respect to the allegations that the UK Defendants violated N.Y.S. consumer protection statute, N.Y. Gen. Bus. L. 349 ["the Statute"], the UK Defendants do not maintain a presence in New York State; do not "engage in the sale of consumer goods and services" in New York State or elsewhere; and Plaintiff has not alleged the requisite injury or

damages necessary to bring a private action under the Statute. Finally, there will be no prejudice to Plaintiff should this motion to vacate the default under FRCP 55(c) be granted as discovery has not been conducted and Plaintiff can re-serve the UK Defendants.

1. Failure of the UK Defendants to answer or otherwise appear in this action was not willful as they were never served with the Complaint.

The UK Defendants can demonstrate that their failure to answer the Summons and Complaint was not willful. A finding of willfulness is only appropriate where the failure to answer was "in bad faith" or the result of "egregious or deliberate conduct." Jefferson v. Rosenblatt, No. CV-13-5918 (E.D.N.Y. 2017) (JS)(ARL); 2017 WL 9485708 at *3 (quoting *Int'l Reformed Univ. & Seminary v. Newsnjoy USA*, 2014 WL 923394 at *3 (E.D.N.Y 2014)). Here, the UK Defendants were never served with the Summons and Complaint, as Plaintiff served the UK Defendants at the wrong address and in an untimely manner.

Service here was made under Federal Rule of Civil Procedure 4(f)(1), which provides for service on a defendant located in a foreign country "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents [hereinafter "Hague Convention"]. Since the United States and the United Kingdom are both signatories to the Hague Convention, service of process on defendants in the UK is governed by Article 5(a) of the Hague Convention which allows process to be made by a Central Authority of the country in which service is requested in a manner prescribed by its internal law for the service of documents in a domestic action within its territory. Burda Media, Inc. v. Viertel, 417 F.3d 292, 301(2d. Cir. 2005); Fallman v. Hotel Insider, Ltd., 2016 WL 5875031 at *3-4. Of particular importance, "The Hague Convention should be read together with Rule 4, which stresses actual notice." Burda, 417 F.3d at 301.

Service of process in England, where defendants reside, is governed by Parts 6 & 7 of the Civil Procedure Rules for England and Wales [hereinafter the CPR of England"]. Under 6.8(a) of the CPR of England, where a defendant has designated an address at which it may be served, the defendant must be served at that address. Under 7.5, a defendant must be served within 4 months of the date of issuance of the claim. *See* https://www.justice.gov.uk/courts/procedure-rules/civil/rules. Here, defendants each have a designated address on file with the UK Companies House for service of process, which is a matter of public record. Neither was served at their registered addresses, and neither was served within the time prescribed by law.

Under the United Kingdom Companies Act of 2006, companies and their officers must maintain a registered office to which all communications and notices may be addressed. See Part 6(a), Section 86, https://www.legislation.gov.uk/ukpga/2006/46/part/6. Service of documents on both a company and/or its officers is to be made to that address that the company or officer has registered with the UK Companies House so long as it appears in that part of the registration available to the public. Part 37, Sections, 1139(1), 1139(3), 1140(1), 1140(4). https://www.legislation.gov.uk/ukpga/2006/46/part/37/crossheading/service-addresses.

As the CEO of RM, Defendant Nick Youngson has registered address with the UK Companies House of 9 Lyndale Court, Winsford, England, CW7 2BZ. RM has a registered address with the UK Companies House of Suite 11, Stanley Grange, Ormskirk Road, Knowsley Village, Merseyside, United Kingdom, L34 4AR. Both addresses are designated for the purposed of service of process and other notices and are available in that part of the UK Companies House registration available to the public. www.gov.uk/government/organisations/companies-house. *See* Exhibit K; Youngson Declaration at ¶¶ 1-2, 21-30.

However, instead of attempting to serve the UK Defendants at either registered address,

Plaintiff attempted to serve Mr. Youngson at a residence he had sold and vacated six months earlier (*see* Exhibit I, Exhibit L; Exhibit M; Youngson Declaration at ¶¶ 24-25), and attempted to service RM Media by serving co-defendant Higbee (*see* Exhibit C). Higbee was not authorized and has never been authorized to accept service of process for either UK Defendant. *See* Youngson Declaration at ¶ 26. According to the Attestation filed with the Court, the Summons and Complaint was allegedly served on Mr. Youngson, individually, on November 5, 2018, by inserting the papers through a mail slot at a residence located at 15 Church Road, Hale Village, Liverpool, England, L24 4AY. *See* Exhibit I. The Attestation does not state that RM was being served through Mr. Youngson as its CEO; RM was not referenced as a party to be served; and Mr. Youngson was not identified as the CEO of RM. Id.

Not only was the 15 Church Road address *not* the proper address to serve Mr. Youngson (or RM) under the CPR of England, but Mr. Youngson never received the Summons and Complaint, as he had sold and vacated the Church Road property on June 7, 2018, more than six months prior to the attempted service. *See* Exhibit L; Exhibit M; Youngson Declaration at ¶¶ 24-25. This service was also untimely under the CPR of England as it was requested on October 10, 2018, which is more than four months after the cause of action was initiated, thereby making it invalid. *See* Exhibit J.

According to the Summons filed with the Court (*see* Exhibit C), RM was served care of *co-defendant* Higbee in Santa Ana, CA. This service was also deficient. Higbee is merely one of several law firms employed by RM to enforce its copyrights in the United States. Higbee is not authorized and has never been authorized to accept service of process for the UK Defendants. Nor is there any evidence that Higbee did so. . *See* Youngson Declaration at ¶ 26.

Similarly deficient was Plaintiff's final attempt at service of process on the UK

Defendants. On January 2, 2019 Plaintiff attempted service on both UK Defendants by again placing the Summons and Complaint in the mail slot of the 15 Church Road residence, a full seven months after the action was initiated. *See* Exhibit N. According to FPS, service of process under SFP 2018-26592 was first requested on December 19, 2018, more than six months after the action was initiated. *See* Exhibit J. In fact, the Attestation for that attempt does not even state that it complies with applicable law. *See* Exhibit N.

Thus, not only did the attempts at service of process fail to comply with the Hague Convention, the CPR of England, FRCP and CLPR section 308, but the failure of the UK Defendants to receive *actual* notice does not comply with the requirements of Due Process under the Constitutions of the United States and the State of New York. *See* Fallman, 2016 WL 5875031 at *4 (citing *Ackerman v. Levine*, 788 F.2d 830, 838 (2d Cir. 1986). Service at the wrong address "is not a technical error that can be overlooked." Id. at *4. In fact, this Court has held when considering a motion to vacate a default under FRCP 55(c) or to vacate a default judgment under FRCP 60(b), where there has not been proper service of the complaint, the court need not resort to its usual analysis of the "three factors" but should vacate the default automatically as void. Austin Energy, 2013 WL 6835192 at *3.

2. The UK Defendants have a "meritorious defense."

To satisfy the criterion of a "meritorious defense" to vacate a default under FRCP 55(c), the likelihood of success-analysis used for FRCP 60(b) is not required. Rather a defendant must only demonstrate that the defense is based on "good law so as to give the factfinder some determination to make." Jefferson v. Rosenblatt, 2017 WL 9485708 at *3. Allegations are meritorious if "they contain even a hint of a suggestion which, proven at trial, would constitute a complete defense." Id. (quoting *Weisel v. Pishel*, 197 F.R.D. 231, 239 (E.D.N.Y. 2000))

Here, the UK Defendants can demonstrate numerous meritorious defenses to the Claims for Relief (in addition to their jurisdictional defenses). In its Complaint, filed on June 8, 2018, Plaintiff's "First Claim for Relief" seeks a declaratory judgment that Plaintiff never committed any copyright infringements in connection with its use of the Copyrighted Work, and a declaratory judgment insulating it from any claims for breach of contract based on its use(s) of the Copyrighted Work. *See* Exhibit C.

First, Plaintiff acknowledges in its Complaint that it used the Copyrighted Work without complying with the express terms on the Blue Diamond Gallery Website or otherwise crediting the Copyrighted Work, i.e. that it infringed on RM's copyright. *See* Exhibit C at ¶¶ 18-28; Exhibit 1 to Exhibit C. Second, RM Media is the sole owner of the rights to the Copyrighted Work, and thus, there can be no Claim against Mr. Youngson individually. *See* Exhibit H. Nor can Plaintiff demonstrate an actual case or controversy in that regard.

Plaintiff's "Second Claim for Relief," alleged against all Defendants, is a supplemental state claim under Section 349 of New York's General Business Law, which is a consumer protection statute. *See* Exhibit C at ¶¶ 50-51 First, neither UK Defendant maintains the minimal contacts necessary with the State of New York sufficient to confer jurisdiction. Nor does either UK Defendant engage in the "sale of consumer goods and services" as required under the Statute. RM deals exclusively with licensees, and Mr. Youngson is merely an Officer of RM and does not act in his individual capacity.

Finally, the Statute requires that specific injuries and damages be alleged as a basis for maintaining a private cause of action. Plaintiff has alleged neither.

3. There will be no prejudice to Plaintiff is the default is vacated.

Where, as here, a defendant has made a FRCP 55(c) motion to vacate shortly after the

default was entered, and where discovery has not yet commenced, there is no prejudice to Plaintiff in vacating the default. *See* Goldstein v. Urgo Eleuthera Hotels, Ltd., 2016 WL 1019394 at *3; JXB 84 LLC v. Loftis, No. CV-15-5707 (E.D.N.Y. 2016) (ADS) (ARL), 2016 WL 4032643 at *3; Mathon v. Marine Midland Bank, N.A., 875 F.Supp. 986, 993 (E.D.N.Y. 1995).

B. WHERE SERVICE OF PROCESS WAS INEFFECTIVE THERE IS NO NEED TO MAKE FURTHER INQUIRY UNDER THE F.R.C.P. 55(C); THE COURT MAY SKIP THE "GOOD CAUSE" ANALYSIS AND VOID THE DEFAULT.

Where service of process is insufficient, a court need not conduct a "good cause" analysis when considering either a motion to vacate a default under 55(c) or a default judgment under 60(b). Austin Energy, LLC v. Eco Lumens, LLC, 2013 WL 6835192 at *3 (vacating the default *judgment* without further analysis; quoting *Klein v. U.S.*, 278 F.R.D. 94, 97 (W.D.N.Y. 2011)). Where a court lacks jurisdiction over a defendant, a default against it is void and must be set aside. Austin Energy, 2013 WL 6835192 at *3. The Court may either dismiss the action or retain the case but quash the service. Fallman, 2016 WL 5875031 at *4 (citing *Zapata v. City of New York,* 502 F.3d 192, 196-97 (2d Cir. 2007). Ineffective service cannot be overlooked. Id. For the reasons stated in Part A(1), *supra*, service of process on the UK Defendants was defective. Thus, this Court should not only vacate the default under FRCP 55(c), but quash the service of process or dismiss the action against them entirely.

CONCLUSION

For the foregoing reasons, the Certificate of Default against Nick Youngson and RM Media, Ltd., entered on February 20, 2019, should be vacated, and the service of process quashed or the action dismissed.

Dated: March 11, 2019

Respectfully submitted,
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